

R E P O R T S

O F

C A S E S

ARGUED AND DETERMINED

IN THE

Court of King's Bench,

With Tables of the Names of Cases and Principal Matters.

BY EDWARD HYDE EAST, Esq.
OF THE INNER TEMPLE, BARRISTER AT LAW.

*Si quid novissi rectius istis,
Candidus imperti; si non, his utere mecum.* HOR.

VOL. I.

Containing the Cases in the 41st Year of GEO. III.

1800—1801.

L O N D O N:

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1801.

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IN compliance with a desire very generally expressed by the Profession, the TERM REPORTS will in future be published in *Octavo*. And as the Author has been deprived of the assistance of his valuable and much respected Colleague with whom his labours have been so long shared, he deems it proper to commence a *New Series*, of which these Reports will constitute the First Part.

ADELPHI TERRACE,
Michaelmas Term 1800.

J U D G E S
OF THE
COURT OF KING's BENCH,
During the Period of these REPORTS.

LLOYD Lord KENYON, Lord Chief Justice. .

Sir NASH GROSE, Knt.

Sir SOULDEN LAWRENCE, Knt.

Sir SIMON LE BLANC, Knt.

Attorneys General.

Sir JOHN MITFORD, Knt.

Sir EDWARD LAW, Knt.

Solicitors General.

Sir WILLIAM GRANT, Knt.

The Honorable SPENCER PERCEVAL.

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N. B. Those Cases which are printed in *Italics* were cited from
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C A S E S

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Forty-first Year of the Reign of GEORGE III.

1800.

JONES *against* BRINLEY.

Saturday,
Nov. 8th.

THE plaintiff declared upon a special agreement that in consideration that he had stated to the defendant that it was in his, (the plaintiff's,) power to give the defendant certain information which might enable one *F. N.* to receive a considerable sum of money then due to him, and also in consideration that the plaintiff at the request of the defendant would give such information to the defendant as might enable the said *F. N.* to receive the said sum, the defendant undertook and promised the plaintiff to pay him on the day upon which any money should be received by *F. N.* or by the defendant on *F. N.*'s behalf through the means of the plaintiff's information, the sum of 10*l.* per cent. on the money so received. The declar-

An agreement to pay a per centage upon the day on which any money should be received by the defendant through the means of the plaintiff's information does not entitle the plaintiff to a stipulated reward upon the transfer of it in consequence of his information, although he might afterwards receive the dividends thereon.

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ation

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 JONES
 against
 BRINLEY.

ation then averred that the plaintiff did give the defendant certain information respecting divers sums of money which *F. N.* was entitled to receive under and by virtue of the last will and testament of one *A. N.* deceased, and that *F. N.* through the means of such information on the 27th January 1800, did receive the sum of 500 *l.* whereby the defendant by virtue of his promise became liable to pay to the plaintiff 50 *l.* &c. The second count stated more generally that the defendant was indebted to the plaintiff in so much for certain information given by the plaintiff to the defendant at his request, whereby *F. N.* was enabled to receive and did accordingly receive divers large sums before then due to him, and being so indebted the defendant promised, &c. There were also the general money counts and for work and labour. The defendant pleaded the general issue.

At the trial before Lord *Kenyon* at the last sittings at Guildhall the agreement in writing was proved, whereby the defendant "undertook to pay to the plaintiff on the day upon which any money should be received by *F. N.* or by him, (the defendant,) on his behalf, through the means of the plaintiff's information, the sum of 10 *l.* per cent. on the money which should be so received." It was also proved that, in consequence of information given by the plaintiff to the defendant, *F. N.* had obtained 500 *l.* stock which had stood in the name of *A. N.*, from whom the defendant derived title as residuary legatee; and evidence was adduced for the purpose of shewing that he had afterwards received ten years dividends due thereon. It was objected by the defendant's counsel that it was stock and not money which had been obtained through the medium of the plaintiff's information, and therefore he

was not entitled to recover any thing under the terms of the agreement; and that the dividends were merely consequential to the stock; and it was not the meaning of the parties that 10l. per cent. should be paid upon all the interest which might accrue, but merely for the principal sum if any. Lord *Kenyon* admitted the objection and non-suited the plaintiff.

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against
BRINLEY.

Cornyn after stating the facts, as abovementioned, now moved to set aside the non-suit, contending that the proof sustained the agreement; for stock was to be estimated as so much money, into which it was convertible; and that at any rate the receipt of the dividends (*a*) due at the time of the transfer of the stock was a receipt of so much money within the meaning of the agreement. But

The Court thought the objection well founded; and animadverted upon the immorality of such bargains as the one in question, which had grown of late into practice.

Rule refused (*b*).

(*a*) This fact was offered to be more fully supplied by affidavit; but the Court thought this was not a case in which the plaintiff should be allowed to bring forward any fact that had not distinctly appeared at the trial: and therefore quære as to any opinion on this point.

(*b*) An action for money had and received does not lie to recover stock. *Nightingal* and others assignees of *Mettivier v. Denijme*, 5 Burr. 2589. and 2 Black. Rep. 684. Lord *Mansfield* said "It is a new species of property, and is not money."

1806.

Monday,
Nov. 10th.

SWEET and, Another Assignees of GARD, a Bankrupt, against PYM.

One who has a lien on goods in his possession, if he afterwards deliver them to a ship carrier to be conveyed on account and at the risk of his principal, though unknown to the carrier, cannot recover his lien by stopping the goods in transitu, and procuring them to be re-delivered to him by virtue of a bill of lading signed by the carrier in the course of his voyage.

IN trover for certain bales of cloth the facts appeared to be these. The bankrupt, a clothier residing in *London*, before his bankruptcy employed the defendant, a fuller residing in *Exeter*, in his business; and at the time of the transaction aftermentioned the bankrupt was indebted to the defendant upon the general balance of accounts in more money than the value of the goods in question: and by the custom of the trade at *Exeter* the defendant had a lien for his general balance. The cloths for which the action was brought had been sent by *Gard* before his bankruptcy to the defendant to be full'd as usual: and after they were finished the defendant, in consequence of prior orders from *Gard*, shipped them on board a certain vessel at *Exeter* to be forwarded to him in *London*, and sent the invoice to *Gard*. No bill of lading was signed by the captain at the time of the shipment: but soon after the vessel sailed *Pym*, hearing of *Gard's* bankruptcy, followed and overtook the captain off *Deal* in his passage to *London*, and there procured him to sign a bill of lading to *Pym* or his order, by virtue of which *Pym* obtained the delivery of the goods on their arrival in *London*.

At the trial before Lord *Eldon* at the last assizes for the city of *Exeter* the plaintiffs recovered a verdict under his Lordship's direction, he being of opinion that no person having a lien on goods, can if he part with the possession afterwards stop them in transitu, and thereby revive his

lien against the owner. But he gave the defendant's counsel leave to move this Court to enter a non-suit, if they should be of a different opinion.

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 SWEET
against
Pym.

Gibbs now moved accordingly, on the ground that the captain having received the goods from the defendant, and not being accountable to any other person for the delivery of them, (for he had received no orders from *Gard*), it was the same as if they had remained in the actual possession of the defendant. That there could have been no doubt if the defendant had taken the bill of lading to his own order at first; and his taking it afterwards before the goods got to the possession of *Gard* was the same thing. It was equally an acknowledgment by the captain that he held the custody of them on the defendant's account.

LORD KENYON C. J. The right of lien has never been carried further than while the goods continue in the possession of the party claiming it. Here the goods were shipped by the order and on account of the bankrupt, and he was to pay the expence of the carriage of them to *London*: the custody therefore was changed by the delivery to the captain. In the case of *Kinloch v. Craig* (a) where I had the misfortune to differ with my brethren, it was strongly insisted that the right of lien extended beyond the time of actual possession; but the contrary was ruled by this Court, and afterwards in the House of Lords: though there the factor had accepted bills on the faith of the consignments, and had paid part of the freight after the goods arrived.

(a) 3 Term Rep. 119. afterwards in *Dom. Proc.* ib. 786.

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SWEET
against
P.T.N.

GROSE J.—I consider the delivery of the goods by *Pym* to the captain to be equivalent to a delivery to *Gard*.

Per Curiam,

Rule refused.

Tuesday,
Nov. 11th.

SMITH and Another against BUCHANAN and
Another.

A discharge under a commission of bankrupt in a foreign country is no bar to an action for a debt arising here against the bankrupt by a creditor a subject of this country.

ASSUMPSIT for goods sold and delivered, and upon the common money counts. Pleas, 1. non-assumpsit, 2. for a further plea in discharge of the persons estate and effects of the defendants, except any property, if any there be, after the date of a certain deed dated 23d of *September* 1799 after mentioned, acquired or to be acquired by the defendants, by descent devise bequest or in course of distribution, they say, that by a certain law of the state of *Maryland* made on the 10th of *April* 1787 intituled “an act respecting insolvent debtors,” it was enacted that any debtor for any sum above 300*l.* might apply by petition to the chancellor of the said state, and offer to deliver up all his property to his creditors, a schedule whereof with a list of creditors should be exhibited therewith; and thereupon the chancellor might direct personal notice of such application to be given to the creditors or as many as could be served therewith, or he might direct the notice to be published in the newspapers; and on the appearance of the creditors or their neglect to appear on due notice, the chancellor might administer an oath to the debtor binding himself to deliver up and transfer to his creditors all his property, &c. in such manner as the chancellor should direct; and that the chancellor should thereupon appoint a trustee on behalf of the creditors,

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tors, and should direct such debtor to execute a deed, to such trustee of all his property debts rights and claims in trust for the creditors; "and thereupon, and upon the execution of the said deed, and after the delivery of the property books bonds and other evidences of debts to such trustee, and his certificate of such delivery, *the chancellor might order that such debtor should for ever thereafter be acquitted and discharged from all debts by him owing or contracted at any time before the date of such deed;*" and in virtue of such order such debtor should be for ever so discharged: provided that any property thereafter acquired by such debtor by descent devise bequest or in course of distribution should be liable to the payment of his debts. The plea further stated that after the making of that law the defendants were joint debtors for more than 300*l.*; that they petitioned the chancellor and offered to deliver up all their property to the use of their creditors with the schedule and list of creditors thereunto annexed; that thereupon the chancellor gave the due notice to the creditors, and administered the oath to the defendants; and appointed one *S. Moale* trustee on behalf of the creditors; and directed the defendants to execute a deed to the said *S. M.* for all their property debts rights and claims &c. in trust for their creditors. That thereupon the defendants did accordingly on the 23d September 1799 execute such deed of that date, and did then deliver up to the said *S. M.* as such trustee &c. all their property books &c. who thereupon certified such delivery to the said chancellor; and thereupon the chancellor according to the said act ordered that the defendants should for ever thereafter be acquitted and discharged from all debts by them owing or contracted before the date of the said deed; except that any property afterwards acquired by them by descent &c.

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against
BUCHANAN.

should be liable to the payment of their debts. The defendants then averred that they, at the time when the several causes of action in the declaration mentioned accrued, and until and at the time of the said order of discharge, were inhabitants and residents in the said State of *Maryland*, and that the said several causes of action accrued and were owing before the date of the said deed of trust executed by the defendants to *S. M.* wherefore they prayed judgment, and that their persons, estates and effects, save and except any property, if any, acquired after the date of the said deed by the defendants by descent &c. may be discharged &c. A third plea contained the same facts together with an averment, that the defendants had not since the date of the trust deed acquired any property by descent &c. and concluded in the bar of the action generally. Replication that *the causes of action* in the declaration mentioned severally *accrued to the plaintiffs within this kingdom of England*: to which there was a general demurrer and joinder.

Giles in support of the demurrer. The order of discharge obtained by the defendants under the law of the State of *Maryland* is analogous and equivalent to the certificate of a bankrupt here; and having been issued by a competent jurisdiction in the case of subjects of that State resident there at the time, though it has not the binding force of a law in this country, yet the courts here will take cognizance of and give it effect by adoption and the curtesy of nations. Our courts recognize the laws of a foreign state in many instances. The *lex loci* governs the construction of contracts, (a): and the distribution of

(a) *Vide Burrows v. Jemino*, 2 *Str.* 733.

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 SMITH
against
 BUCHANAN:

intestate's effects depends on his domicile at the time of his death, though he had property in other countries. Even in the instance in question of bankruptcy it is in every day's practice that actions are sustained by assignees and trustees under foreign commissions of bankrupt against debtors of the bankrupts residing here; which shews that the law recognizes the alteration of the property. But it would be inconsistent and unjust to give effect to so much of the law as divests the property out of the bankrupt, and deny him the benefit of the condition on which it was so divested, namely, indemnity against antecedent claims. If it be true that our courts will give credence to the judicial acts of a foreign state in matters over which they had a competent jurisdiction by the laws of that state, it follows that neither the locality of the contract nor the country of the contracting parties can vary the case. It is clear that this order would have been a discharge of the defendants if the plaintiffs had instituted their suit in *America*; and it would have been no answer that the contract was made in *England*, or that the plaintiffs were subjects of *England* and not bound by the law of *Maryland* in regard to bankrupts. It is also clear that after the proceedings which took place in *America* it would have been an answer to a suit instituted here by the bankrupts against a debtor that their property was divested by such proceedings. Then in justice they are entitled to avail themselves of the same law for their protection against the suit of a creditor: more especially as the order of discharge was grounded on a good consideration, namely, the surrender by the defendants of the whole of their property for the use of their creditors. It is true that it was holden in *Folliott v. Ogden* (a) that a man's having

(a) 1 H. Blac. 123.

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SMITH
against
BUCHANAN.

Seen deprived of all his property by an act of confiscation of a foreign state, which at the same time provided a fund for the payment of his debts there, was no answer at law to a suit by a creditor here. But that went on the ground that no nation will take cognizance of the laws of forfeiture of another. And in *Wright v. Nutt* (a) those circumstances were holden to be sufficient grounds for a court of equity to interpose by injunction against the suit of the creditor. In the former case several cases (b) in Chancery were cited and approved to shew that our courts recognized the bankrupt laws of a foreign state, so as to vest debts due in *England* to a bankrupt in his curators or assignees in the foreign country. The case however of *Ballantine v. Golding* (c) comes nearest to the present, where a certificate obtained under a commission of bankruptcy in *Ireland* was holden a bar to an action here against the bankrupt for a debt arising prior to the bankruptcy. It is true that the debt there was contracted in *Ireland*; but Lord Mansfield recognized it as a general principle, that what is a discharge by the law of one country will operate as a discharge in another. And he said that he remembered a case in Chancery of a cessio bonorum in *Holland*, which is a discharge there, having been allowed the same effect here.

R. Smith contra was stopped by the Court.

Lord KENYON, C. J. It is impossible to say that a contract made in one country is to be governed by the

(a) 1 H. Blaf. 136.

(b) Ib. 131. in notis, viz. *Solomons v. Ross*, 1764. before Barburff J.; *Jolles v. Depontbien* 1769 before Lord Camden; and *Neal v. Cottingham* in *Ireland* 1764.

(c) *M^c 23 Ger. 3.* *B. R. Cooke's Bank*, L. 347. 1st edit.

laws of another. It might as well be contended that if the State of *Maryland* had enacted that no debts due from its own subjects to the subjects of *England* should be paid, the plaintiff would have been bound by it. This is the case of a contract lawfully made by a subject in this country, which he resorts to a court of justice to enforce; and the only answer given is that a law has been made in a foreign country to discharge these defendants from their debts on condition of their having relinquished all their property to their creditors. But how is that an answer to a subject of this country suing on a lawful contract made here? how can it be pretended that he is bound by a condition to which he has given no assent either express or implied? It is true that we so far give effect to foreign laws of bankruptcy as that assignees of bankrupts deriving titles under foreign ordinances are permitted to sue here for debts due to the bankrupts' estates: but that is, because the right to personal property must be governed by the laws of that country where the owner is domiciled. That was recognized in the case of *Hunter v. Potts* (a). The Court there considered the assignment of the bankrupt's effects in another country, although in fact made in invitum, as equivalent here to a voluntary conveyance by him (b). The case of *Ballantine v. Golding* is very distinguishable from the present; for there the debt was contracted in *Ireland* where the commission issued. But in the same page of the book (c) from whence that was quoted is to be found an opinion of Lord *Talbot*'s directly contrary to the conclusion we

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(a) 4 Term Rep. 182. 192.

(b) *Cook Bank.* 1747. cites *Beawes Lex Merc.* 499.

(c) See the case of *Waring v. Knight*, Sittings at Guildhall after Hil. T. 3 Geo. 3. cor. Lord *Mansfield*, where the same opinion was entertained. ib. addenda to 1st edit.

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were desired to draw in this case; for there he held that though the commission of bankrupt issued here attached on the bankrupt's effects in the plantations, yet his certificate would not protect him from being sued there for a debt arising therein. The same rule then must prevail here.

LAWRENCE J. If the defendants had made a voluntary assignment of all their property to the use of their creditors, it is not pretended that that would have been a bar to the suit of the plaintiffs; and yet the title of the assignee would have been as valid here as under the foreign commission; which shews that the validity of the title under such an assignment cannot make any difference in the present argument. Then it rests solely on the question, Whether the law of *Maryland* can take away the right of a subject of this country to sue upon a contract made here, and which is binding by our laws? This cannot be pretended: and therefore the plaintiffs are entitled to judgment.

GROSE and LE BLANC, Justices, concurring,

Judgment for the plaintiffs (a).

(a) In *Pedler v. McMaister*, 8 T. Rep. 609. the Court refused to discharge a defendant out of custody who was arrested at the suit of a creditor resident here, on an allegation that the debt was contracted at *Hamburg*, and that the defendant had become a bankrupt and obtained his certificate there, and that the plaintiff might have proved his debt under the commission: for the Court said that as the plaintiff was not resident in *Hamburg* at the time of the bankruptcy, they would not decide the question in a summary way, but put the defendant to plead his bankruptcy and discharge. The defendant accordingly filed such a plea, which the Court held to be informally pleaded; and the matter never came on again.

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The KING *against* The Inhabitants of BILTON
with HARROWGATE.

W. Inclday,
Nov. 12th.

ON an appeal to the quarter sessions for the West Riding of *Yorkshire* against an order of two Justices, removing *Grace Barber* the wife of *Henry Barber* a private foldier in the fifth battalion of Royal Artillery together with *Ann* and *Henry* their children, from the township of *Leeds* to the township of *Bilton with Harrowgate*, the sessions confirmed the order, subject to the opinion of this Court on the following case.

The examination of a foldier touching his settlement, which is made evidence by the Mutiny Act, must be authenticated before it can be received in evidence, and does not prove itself *prima facie*, though the paper appear to be in the form prescribed by the statute.

On the hearing of the appeal, Mr. *John Atkinson* the attorney for the respondents produced a written paper, of which the following is a copy :

“ *Durham*, to wit, The examination of *Henry Barber* a private foldier in the 5th battalion of Royal Artillery, taken and made before us two of his majesty’s justices of the peace for the said county, the 5th of *March* 1800 ; who on his oath saith that some time in the beginning of the year 1777 he bound himself by indenture to *Richard Smith*, in the township of *High Harrowgate*, in the parish of *Knarefborough* in the county of *York*, to serve him as a shoe-maker for the term of seven years. That he served the whole of such term, and slept all the time in his master’s house in the township of *High Harrowgate*. And saith that he hath never since gained any other settlement.

Taken and sworn the day and
year aforesaid, before us

Richard Wallis,
Robert Green.

The mark of

+

Henry Barber.”

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Which paper writing so produced by the said *John Atkin-son* he said that he had received from *Musgrave* the overseer of the poor of *Leeds*; but the said *Musgrave* was not produced as a witness, nor was any evidence whatsoever offered either to prove that the said *Richard Wallis* and *Robert Green* were magistrates for the said county of *Durham*; or that the signatures subscribed to the said paper writing were the signatures of the said magistrates, other than what appears upon the said paper. The counsel for the Appellants objected to the Court receiving this evidence, which objection was over-ruled subject to the opinion of this Court.

Wood and *Heywood*, in support of the order of sessions, contended that the written examination produced was *prima facie* evidence of the settlement under the provisions of the Mutiny Act (a); for it was decided in *R. v. The Inhabitants of Warley* (b) that the original examination of

(a) S. 53. enables two or more justices of the peace for the county &c. where any non-commissioned officer or soldier shall be quartered, in case such officer or soldier has either wife or child or children, to cause such officer or soldier to be summoned before them, in the place where they are quartered, in order to make oath of the place of their last legal settlement; and such persons are directed to obey such summons, and to make oath accordingly. And such justices are thereby required to give an attested copy of such affidavit to the person making the same, to be by him delivered to his commanding officer, in order to be produced when required; which attested copy shall be at any time admitted in evidence as to such last legal settlement before any of his majesty's justices of the peace, or at any general or quarter session of the peace. Provided always that in case any such officer or soldier shall be again summoned to make oath as aforesaid, then on such attested copy of the oath by him formerly taken being produced by him or by any other person on his behalf, such officer or soldier shall not be obliged to take any other or further oath with regard to his legal settlement, but shall leave a copy of such attested copy of examination if required.

(b) 6 Term Rep. 534.

a soldier

a soldier touching his settlement as well as the attested copy of it was admissible evidence of the settlement under that act.

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Lord KENYON C. J. interfering, said that the case was too plain for argument. That the paper in question might possibly have been good evidence if properly authenticated: but the objection here was that the possession of it was not accounted for, or any other circumstance proved to authenticate it (a). The mere production of it in court proved nothing.

The respondent's counsel then prayed the Court to send the case down again to the sessions to be heard upon the merits. But

Lord KENYON C. J. said that it was their own fault in not being prepared with sufficient legal proof upon the trial of the appeal: and it would be of mischievous consequence to permit parties to go to another trial because their evidence was defective in the first instance. That the Court were bound to quash the order of sessions, which appeared to have no foundation for its support; and the consequence followed of course.

Per Curiam,

Both orders quashed.

Lambe was to have argued against the orders.

(a) The want of proof of the hand writing of the magistrates had been before suggested at the bar as the principal objection to the admission of the evidence.

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Thursday,
Nov. 13th.

PITT *against* THOMPSON.

The Court will discharge a feme covert on common bail, tho' at the time of the credit given to her by the plaintiff she mistakenly informed him that her husband was dead; there being no fraud intended.

A RULE was obtained calling on the plaintiff to shew cause why the defendant should not be discharged out of custody on common bail in this action of assumpsit, on the ground of her being a feme covert. The affidavit stated the cause of action to be for the rent of a house in which she had resided for several years, and for which previous to the year 1796 the rent had been paid by her husband, who was a sea-faring man. At that period she applied to the plaintiff her landlord, and informed him that she had not heard of her husband for a long time, and believed he was dead, and desired to continue tenant of the premises, to which the plaintiff assented. And from that time she had passed as a single woman, and had contracted as such with other persons as well as the plaintiff. But it was now sworn that her husband was living.

Best shewed cause against the rule, and referred to the cases of *Partridge v. Clarke* (a), and *Waters v. Smith* (b), where the Court, in recognizing the practice of discharging married women on summary applications of this kind, qualified the rule with the exceptions, where the fact itself was doubtful, and where the credit had been obtained by the defendant by imposing herself on the plaintiff as a single woman; which latter he contended had been done in this case: and the plaintiff had no means of ascertaining the truth of the other fact sworn to. But

(a) 5 Term Rep. 194.

(b) 6 Term Rep. 451.

The Court thought that the defendant was entitled to the relief prayed, considering her as having made the representation of her husband's death to the plaintiff through mistake, and not from any intention to impose upon him.

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Rule absolute (a).

Larves in support of the rule.

(a) The Court granted a similar application in a case where the plaintiff at the time of the credit given to the defendant knew that she had a husband living abroad, though under terms of separation from her. *March v. Capelli*, Hil. 39 Geo. 3.

JENNINGS against MITCHELL.

Friday,
Nov. 14th.

THE plaintiff held the defendant to bail for the sum of 1190*l.* 11*s.* 3*d.* and in the affidavit to hold to bail the plaintiff, after swearing to the debt to the amount stated, deposed, "that the defendant hath not made any tender or offer to pay the *said* sum in bank of *England* notes to the knowledge or belief of this deponent."

In an affidavit to hold to bail for 1190*l.* 11*s.* 3*d.* it is not enough to negative a tender of the *said* debt in bank notes; for non constat but a tender in bank notes was made of all but the fractional sum, which would be sufficient within the statute

37 Geo. 3. c. 45.

A rule was obtained calling on the plaintiff to shew cause why the bail bond should not be delivered up to be cancelled, and a common appearance entered for the defendant, on the ground that the tender of the debt in bank notes was not properly negated, according to the provisions of the bank act, 37 Geo. 3. c. 45. which requires (f. 9.) that no person shall be holden to special bail, "unless the affidavit to hold to bail contain therein that "no offer has been made to pay the sum of money, in "such affidavit mentioned &c. in notes of the said Governor and Company expressed to be payable on demand, "(fractional parts of the sum of twenty shillings only excepted)"

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&c. and non constat, according to this affidavit, but that there may have been a tender of 1190*l.* in bank notes, which would have been a compliance with the statute as nearly as the sum would admit of; and the affidavit ought to have proceeded to negative a tender of any part of the debt in bank notes. To this it was answered that the fair construction of the affidavit was that there was no tender of the debt in bank notes as far as it was possible to make such a tender on account of the fractional sum. But

The Court said that the objection, which however was *stricti juris*, must prevail.

'Rule absolute.

Giles in support of the rule.

Parnaker against it.

Frid. 7.
Nov. 14th.

JARRETT *against* DILLON.

The plaintiff in an affidavit to hold the defendant to bail must give himself an addition, otherwise the defendant will be discharged on common bail.

A RULE was obtained calling on the plaintiff to shew cause why a common appearance should not be entered for the defendant upon the defect of the affidavit on which he had been holden to bail, in which the plaintiff was merely described as of such a place, without giving himself any addition of state or degree. This objection was grounded on the rule of Court of *Mich. 15 Car. 2. 1663.* whereby "It is ordered that the true place of abode and the true addition of every person who shall make affidavit in court here shall be inserted in such affidavit."

'*Erskine* and *Barrow* shewed cause against the rule; 1st. because the rule only applied to an affidavit made in

a cause

a cause in Court, whereas an affidavit to hold to bail was only in the nature of process to bring the party in. 2dly. It was not competent to the defendant to take any objection to any proceeding in the cause till he had appeared in Court according to the condition of the bail bond by putting in good bail; after which if the objection were well founded he might avail himself of it in discharge of his bail (a). But

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The Court said that the rule of Court in question had always been acted upon in this instance as well as in others; and it was important to preserve the settled form of proceedings; and that no affidavit should be received without such addition. That this had probably been required in conformity to the statute of additions 1 Hen. 5. c. 5. which made such addition necessary in all original writs of actions personal appeals and indictments; and in criminal cases any defect of this kind was still matter of error (b).

Rule absolute.

Larves was to have supported the rule.

(a) In *Deftborough v. Copinger*, 8 Term Rep. 77. the Court would not admit of any objection being made to the affidavit to hold to bail after judgment by default; but said that any objection of that sort ought to be made in reasonable time after the error committed.

(b) See stat. 8 H. 6. c. 12. 5 Eliz. c. 23. and 4 Ann. c. 16. s. 7. But the advantage is waived by the plea of not guilty. 2 Hale 175. 2 Hazek. ch. 25. s. 25. ch. 25. s. 70.

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Friday,
Nov. 14th.WRIGHT *against* ROBERT HUNTER.

Money paid by one partner to another before the bankruptcy of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, if it be not so applied is proveable as a debt under the commission of the bankrupt partner; altho' the solvent partner were not called upon to repay the debt to the joint creditor till after the bankruptcy of the other. But the solvent partner may recover from the bankrupt his share of such debt so paid after the bankruptcy to the joint creditor, notwithstanding the bankrupt has obtained his certificate.

A. engages as a partner in a particular transaction with *B.*, *C.*, and *D.*, who were before partners; *B.*, *C.*, & *D.* become bankrupts, after which *A.* pays a debt due from himself and them to a joint creditor; held that these three partners constituted but one debtor to *A.*, and that he might recover from *B.* the proportion of *B.*, *C.*, and *D.* towards the joint debt; *B.* not having pleaded in abatement.

THIS was an issue directed by his Honor the Master of the Rolls for the opinion of this Court. The action was for money paid laid out and expended by the plaintiff for the defendant's use, and for money had and received by the defendant for the use of the plaintiff. The defendant pleaded 1. the general issue; 2. a general plea of bankruptcy before the causes of action; on which issues were joined. At the trial a verdict was found for the plaintiff with damages 578*l.* 5*s.* 6*d.* subject to the opinion of the Court on the following case. The defendant together with *Margaret Hunter* and *Henry Keown Hunter* deceased, who were copartners in equal thirds, were concerned with the plaintiff in the year 1791 in a ship called *The Royal Charlotte*, and in the outfit of the said ship upon a slave voyage from the port of *Bristol* to the coast of *Africa*; (viz.) the plaintiff in six twenty-fourth shares, and the defendant and the said *M.* and *H. K. Hunter* as such copartners in eighteen twenty-fourth shares of the said ship and cargo. The defendant and *M.* and *H. K. Hunter* were also purfers or ships' husbands of the ship, and as such it was their duty to pay the charges of the outfit of the ship and cargo, and to receive from the plaintiff his part of the same. Previously to the 8th of *February* 1793 the defendant and *M.* and *H. K. Hunter* as purfers of the ship delivered to the plaintiff the accounts of all the expences of the outfit with the debit and proportion of the plaintiff in and for the same, to be paid by him to the de-

fendant .

defendant and his then partners as aforesaid according to the before mentioned share in such ship and cargo. On the 8th of *February* the plaintiff, and the defendant for himself and his said then copartners, met and adjusted and settled the aforesaid accounts; and the plaintiff then paid to the defendant and his then partners his said 6-24th parts or proportion of the outfit, being 782*l.* 19*s.* 2*d.* On the 9th *October* 1793 the defendant and his partners became bankrupts, and a commission of bankrupt thereupon issued against them, under which the defendant has obtained his certificate. The defendant and the said *M.* and *H. K. Hunter* did not pay all the several creditors of the ship and cargo for her outfit, but at the time of their bankruptcy 1638*l.* 8*s.* 8*d.* was unpaid on account thereof, which said sum the plaintiff as such part owner was called upon to pay. After the making the original purchase by the said part owners of the ship the defendant and the said *M.* and *H. K. Hunter* sold 11-24ths of the same ship, part of their shares in her, to Mr. *Bettington* and a person unknown, but represented by Mr. *Fowler* as his agent, (*viz.*) 3-24ths to Mr. *Bettington*, and 8-24ths to the said unknown person. This sale however was unknown to the plaintiff till after the bankruptcy of the defendant. The shares or parts of the said owners in the ship's unpaid debts of 1638*l.* 8*s.* 8*d.* was by a person appointed by all parties apportioned after the bankruptcy of the defendant as follows:

Mr. <i>Wright</i> the plaintiff	6-24ths of £. 1638 8 8	£. 409 12 2
Mr. <i>Bettington</i> -	3-24ths of ditto -	204 16 1
Mr. <i>Fowler</i> for his principal	8-24ths of ditto -	546 2 9
The defendant <i>Margaret Hunter</i> and <i>Henry Keowen Hunter</i> bankrupts	7-24ths of ditto -	477 17 8
		<hr/> £. 1638 8 8 <hr/>

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The plaintiff paid his 409 *l.* 12 *s.* 2 *d.* for his share of the ship's debt after the defendant's bankruptcy. But there being a failure of payment of the said Messrs. *Hunters'* share of 477 *l.* 17 *s.* 8 *d.* the same was subdivided by the same person between the other partners as follows :

Mr. <i>Wright</i> the plaintiff	6-17ths of £. 477 17 8	£. 168 13 4
Mr. <i>Bettington</i>	3-17ths of ditto	84 6 8
Mr. <i>Fowler</i>	8-17ths of ditto	224 17 8
		<hr/> £. 477 17 8 <hr/>

The said several sums of 84 *l.* 6 *s.* 8 *d.* and 224 *l.* 17 *s.* 8 *d.* were respectively paid by the said Messrs. *Bettington* and *Fowler*, and the said sum of 168 *l.* 13 *s.* 4 *d.* by the plaintiff, after the bankruptcy of the defendant, to the creditors of the ship, in discharge of the said sum of 477 *l.* 17 *s.* 8 *d.* of the said Messrs. *Hunters'* part or share of the debts of the ship. All the creditors of the ship (except two to the amount of 142 *l.* 3 *s.* which the plaintiff paid after the bankruptcy of the defendant,) proved their debts under the commission of bankrupt against the defendant, and received dividends of 3 *s.* in the pound on their debts so proved : but still the said 1638 *l.* 8 *s.* 8 *d.* remained due as aforesaid after payment of the said dividends. The defendant and the said *M.* and *H. K. Hunter* continued in equal thirds entitled to the said ship from the time of the original engagement up to the said bankruptcy, which happened on the said 9th October 1793. The plaintiff has also sued the said *Margaret Hunter* in an action now depending on account of her share of the said ship's debts.

The question is whether the plaintiff is entitled to recover against the defendant the sums of 409 *l.* 12 *s.* 2 *d.* and 163 *l.* 13 *s.* 4 *d.*, or either of them, or any part thereof,

so

so by him paid after the defendant's bankruptcy, notwithstanding his certificate.

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Espinassi, for the plaintiff, contended that he was entitled to recover both those sums, on the ground that the plaintiff's right of action accrued subsequent to the defendant's bankruptcy, and the debts, not being proveable under the commission, were not barred by the certificate. 1. With respect to the sum of 409*l.* 12*s.* 2*d.* the situation of the parties is this; the plaintiff and defendant may be considered as joint owners of a ship, on account of which the defendant, in the character of ship's husband, contracted certain debts; and previous to his bankruptcy the plaintiff paid him the whole of his contributory share towards the discharge of those debts. The defendant misapplied the money and became bankrupt, and subsequent to his bankruptcy the plaintiff was called upon in his character of part owner by the ship's creditors for the payment of part of those demands which he had before settled with the defendant, and was accordingly compelled to pay to the creditors the sum of 409*l.* 12*s.* 2*d.* This sum then not being paid till after the bankruptcy of the defendant was not such a debt as could be proved under the commission. By the act of the 5 *Geo.* 2. *c.* 30. *f.* 7. none but debts owing at the time of the bankruptcy are barred by the bankrupt's certificate: and what is meant by debts is explained in a subsequent part of the same clause, namely, where the cause of action accrued before the bankruptcy. Therefore the debt must have been such whereon an action could have been maintained before the bankruptcy; unless where by the stat. 7 *Geo.* 1. *c.* 31. liquidated debts payable at a future day certain are made proveable under the commission; that is, where the demand is debitum in

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præfenti, solvendum in futuro. Now here there was no liquidated debt due before the bankruptcy for which the plaintiff could have sued the defendant. The defendant was the principal contracting party with the ship's creditors, and responsible to them for the whole; the plaintiff's share of the debts was properly paid into the defendant's hands; nor was there any period before the bankruptcy at which the plaintiff had a right to resume the money which he had so paid. The plaintiff sustained no injury till he was afterwards called upon to repay part of the money again to the creditors. In *Snaith* and others assignees of *Parke v. Gale* (a), the case was that *Parke* had lent his acceptances to *Gale* before the bankruptcy of the latter, but which were not paid till afterwards; and it was decided that *Gale* was liable for the amount notwithstanding his certificate, as for money paid to his use; and though he had given his receipt before his bankruptcy as for so much money as the acceptances amounted to: for, said the Court, there was no debt due at law from the defendant to *Parke* at the time of the bankruptcy; but it arose altogether afterwards by the payment of the acceptances. Nor could any action have been maintained upon the acknowledgment. So here no action could have been maintained by the plaintiff before the defendant's bankruptcy for the money which had been deposited with him as his share of the ship's debts, until the plaintiff was called upon to pay the same again to the creditors after the defendant's bankruptcy, when and not before the sum originally deposited with the defendant became money had and received to the plaintiff's use. The case of the *King v. Eggington* (b) is in point. There it was holden that a

(a) 7 Term Rep. 364.

(b) 1 Term Rep. 369.

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specific sum of money received by an overseer of the poor was not such a debt as could be proved under a commission of bankrupt against him before his accounts were delivered in. For, said Lord *Mansfield*, the debt only arose upon the defendant's conversion of the money to his own use, which was not till after the bankruptcy. And by *Buller J.* the parishioners had no cause of action against the defendant, nor could have sued him, before the bankruptcy. So here till the defendant's accounts were made up after the bankruptcy, it could not be told whether he had misapplied at all or to what extent the money he had received from the plaintiff for the ship's creditors; and consequently there was no liquidated debt at the time of the bankruptcy which the plaintiff could have proved under the commission. 2. The other sum of 168 *l.* 13 *s.* 4 *d.* arises wholly after the bankruptcy, being money paid to the use of the bankrupt after that period, as one of several co-partners, all of whom were liable for the debt. But until one partner has actually paid the share of the others he has no right of action against them; and this it must be admitted was not till after the bankruptcy. This is like the common case of principal and surety, where it has been frequently ruled that if the surety be called upon to pay the principal's debt after his bankruptcy, he cannot come in under the commission, and consequently is not barred by the principal's certificate. Now co-partners are in the nature of sureties for each other. In each case there is a pre-existing liability before the bankruptcy, but no cause of action arises till the surety in the one case, or the co-partner in the other, is damnified by the payment of the money. *Taylor v. Mills*, *Comp.* 525. *Paul v. Jones*, 1 *Term Rep.* 599.

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W. Walton for the defendant. First, As to the sum of 409*l.* 12*s.* 2*d.*, that was the plaintiff's share of the ship debts, adjusted and paid by him to the defendant before his bankruptcy: It was therefore a specific liquidated sum for which the latter was accountable at that period; and consequently was capable of being proved as a debt under the commission if it were not applied pursuant to the authority. The plaintiff's ignorance of its misapplication before the bankruptcy cannot alter the case: the amount of the sum which had been misapplied at the time of bankruptcy was always ascertainable, and that constituted a debt from the defendant to the plaintiff: it was so much money had and received by the one to the use of the other, for which he had not accounted according to the trust reposed in him. This is not therefore like a case of special damage which cannot be liquidated till after the bankruptcy. Nor does the plaintiff declare for special damage, but for so much money had and received by the defendant to his use; the demand being commensurate with the particular sum which had been placed in the defendant's hands before the bankruptcy. Neither is it true that the money so paid could not have been recalled by the plaintiff before that period; for a principal may always recall money out of the hands of his agent by giving him notice before he has applied it. Here the bankruptcy itself was a revocation of the authority, because the money could not be afterwards applied by the defendant. Secondly, in respect of the other sum of 168*l.* 13*s.* 4*d.* claimed by the plaintiff for the defendant's share of the ship's debts paid for him after the bankruptcy; as between the ship's creditors and each of these parties, the whole was due from the plaintiff before the bankruptcy, though as between the several partners themselves, each was only liable

liable to contribute his proportion; therefore this sum also existed as a debt at that time, for which the plaintiff was liable, and as such he might have proved it under the commission. The stat. 5 *Geo. 2. c. 30. s. 41.* makes no distinction between partnership and other debts; but all which were "contracted due or demandable" before the bankruptcy are barred by the certificate. In the stat. 10 *Ann. c. 15. s. 3.* it was even thought necessary to guard the construction of similar words from being extended so far as to do away the liability of the partners of a bankrupt to answer for the joint debts of the partnership, there being no doubt but that the bankrupt partner himself, obtaining his certificate, was thereby discharged. Indeed without this, much of the beneficial effect of a bankrupt partner's certificate would be done away; for in vain would he be liberated in the first instance from the demands of the original creditors, if upon the payment of such debts by his solvent partners afterwards he would become liable to them to the same amount. In the case of a surety, to which this has been likened, he is not the real debtor; the law therefore implies a promise of indemnity to him from his principal in case he shall be called upon to pay the debt. His liability therefore is contingent before the bankruptcy, and therefore cannot be proved as a debt under the commission, if he be not actually damnified till afterwards. It is otherwise in the case of partners, each of whom is jointly and severally liable for the whole debt in respect of those with whom they deal. In *Craven and others v. Knight and others* (a) it is said that one partner paying more than his moiety of a partnership debt on account of the bankruptcy of the

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(a) 2 *Chan. Rep.* 226.

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whether partner may come in under the commission for the surplus beyond his proportion. It is true it does not appear by that case whether the money were so paid before or after the bankruptcy. It follows from the nature of every partnership that there must be mutual debts and credits between the partners; these therefore may be set off against each other, and the balance is a debt proveable under the commission. Besides it may be a question here, whether the plaintiff be not premature in his action; for this being a partnership debt, the partnership fund is in the first instance liable before resort can be had to the separate estate of each partner; and non constat but that the partnership fund is sufficient to answer the demand; or if not the whole at least a part of it, and then the action could only be maintained for the overplus. Till that be ascertained no promise to pay can arise in law; and none is stated to have been made in fact. This then is a new experiment to make one partner liable in an action to another, which cannot be, unless upon a balance struck. *Smith v. Barrow*, 2 T. Rep. 478. [Lord Kenyon C. J. observed that the bankruptcy had put an end to the partnership (*b*), and therefore no question of that sort could arise]. At any rate, supposing the action to be maintainable at all, the plaintiff can only recover one third of his demand against the present defendant; for it appears that there were two other partners concerned in this adventure who were all equally responsible with the defendant; and the law will not imply a promise by the latter to pay more than his just proportion.

Esplanasse in reply. The defendant was one of three partners, all of whom were liable for this demand: if

(*b*) *Vi. Hague v. Rolleston*, 4 Burr. 2176. and *Fox v. Hanbury*, *Corpus*. 448.
therefore

therefore he would have availed himself of the latter objection, he ought to have pleaded in abatement; and not having so done the whole may be recovered from him, and he will have his remedy over against his co-partners for their proportions. As to the principal question; the first sum remained unliquidated till after the bankruptcy; for till then the plaintiff could not know whether all or what proportion had been applied by the defendant; nor was the plaintiff aggrieved till he was called upon after the bankruptcy to pay the money again. As to the second sum; the plaintiff's demand had no existence before the bankruptcy, nor was the defendant accountable for it to him till after that period when the money was for the first time paid by the plaintiff for his use.

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LORD KENYON C. J. I see no hardship in this demand. The plaintiff has been cheated, and endeavours by this action to recover back his money: If the law will give it to him, there is nothing in conscience to prevent his receiving it. The case is shortly this; the plaintiff together with several others were partners in a ship, the plaintiff having a certain share to himself, and the defendant and the other partners holding the remaining shares in conjunction; debts were incurred on the partnership account, a balance was struck, and the plaintiff paid his adjusted proportion of such debts into the hands of the defendant and the other partners, who were the managing owners, in order that it might be by them paid over to the ship's creditors; they have not done so; and the plaintiff has been obliged to pay the money over again to those creditors. It is plain therefore on which side the conscience of the case lies: But unfortunately the money was deposited by the plaintiff in the defendant's hands before

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the bankruptcy of the latter; and he having since obtained his certificate, I do not see how this action can be maintained for that part of the demand amounting to 409 *l.* 12 *s.* 2 *d.* This is like the common case where an agent receives money from his principal to pay over, which he misapplies, and afterwards becomes bankrupt: there can be no doubt but that the amount would be proveable as a debt under the commission; for in default of the due application of it, it becomes money had and received to the use of the principal. As to the other sum in demand of 168 *l.* 13 *s.* 4 *d.* the plaintiff is clearly entitled to recover it. The objection last started, as to the defendant's being only liable for a proportion of this sum, was not thought of before, and there is no foundation for it. As between a creditor and the partners all are liable for the whole debt, though as between the partners themselves each is only answerable for his respective share. The plaintiff here stands in the relation of a creditor to the other three partners. He has been called upon to pay a certain sum after the bankruptcy on account of their delinquency. The defendant and the two other partners formed a distinct partnership with whom the plaintiff contracted, and for whom he paid the money; he might sue all or one of them; and as the defendant has not pleaded in abatement, I think the whole money may be recovered from him. Upon the principal question as to this part of the demand, I cannot distinguish this from the case of a surety, who is called upon to pay money for his principal after a bankruptcy; in which case there is no doubt but that the money may be recovered back from the principal, notwithstanding his certificate.

GROSE J. With respect to the larger sum I at first entertained some doubt, which is now entirely removed. It was argued that before the bankruptcy it could not be told whether any or what part of it had been misapplied, and consequently it was uncertain to what amount the plaintiff could prove a debt under the commission: but in truth the plaintiff was entitled to prove the whole amount of his deposit, subject to be reduced by the bankrupt's shewing the application of any part of it, and thereby ascertaining the real balance of the account. Then it was urged that this was no debt existing at the time of the bankruptcy, because the plaintiff could not have maintained an action against the defendant for the amount at that time, nor till he had been called upon to repay the amount to the creditors, which was after the bankruptcy. That however would depend upon circumstances. For if the defendant before his bankruptcy had been called upon to pay over the money so received by him from the plaintiff, and he had refused to do so, I think he would have been liable as for money had and received to the use of the plaintiff. Now here he could not pay it after the bankruptcy, and therefore it became a debt due to the plaintiff, and as such might have been proved under the commission. As to the lesser sum, I cannot distinguish this case from that of a co-obligor and surety, where money is paid by the surety for the principal after his bankruptcy. There is more difficulty perhaps as to the proportion for which the defendant shall be holden liable in this action; but considering him as one of several partners for whom money has been paid, I think he is liable to the plaintiff for the whole sum of 168 *l.* 13 *s.* 4 *d.*

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LAWRENCE J. I think the larger sum was a debt proveable under the commission and consequently is barred by the defendant's certificate. For when the bankruptcy happened, and the money could not be applied to the purpose for which it was deposited by the plaintiff, it became so much money had and received for his use by the defendant. The lesser sum must be governed by the case of co-obligor and surety, to which it has been justly likened; and therefore I have no doubt that the plaintiff is entitled to recover something; the only question is as to the proportion. If this can be considered as a joint debt there will be a joint implied promise to pay it by the defendant in conjunction with the other two partners; and then the defendant not having pleaded in abatement, the whole may be recovered in this action against him alone. But on this part of the case I have some doubt remaining; and if on re-consideration I should think otherwise in the course of the term I shall mention the

LE BLANC J. I agree with my brethren on the principal questions. The only point on which I entertain any doubt is as to the proportion of the lesser sum which the plaintiff is entitled to recover. It occurred to me at first that the defendant was only liable for one third; but what I have heard has altered my opinion; for considering him jointly liable with the rest of his partners for the whole, he ought to have pleaded in abatement if he wished to avail himself of this objection.

On the following day Lord *Kenyon* C. J. said that the Court had taken under consideration the doubt which
 had

had been thrown out the day before, whether the plaintiff should have judgment for the whole or only for a third part of the sum of 168*l.* 13*s.* 4*d.*, and that they were all of opinion that he was entitled to recover the whole; considering that the three *Hunters*, who were partners together in the transaction, constituted but one debtor with respect to the plaintiff.

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Postea to the plaintiff (a).

(a) *Vi. Smith and another assignees of Hague v. De Silva and others. Crisp. 469.*

DOE on the Demise of CHILLCOTT against
WHITE.

Friday,
Nov. 14.

EJECTMENT on the several demises of *John Chillcott*, the first of the first of *January* 1796, and the second of the first of *January* 1800, for certain freehold lands and premises in *Elsworth Stogumber* and *Brompton Ralph* in the county of *Somerset*, called *Burge's Cottage*, *Burge's Estate*, one moiety of *Truckwell Estate*, and *Middle Whetcombe* in the possession of *Eleanor White*. The cause was tried at the summer assizes at *Wells* 1800 before Mr. Baron *Thomson*, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case;

Emanuel Chillcott being seized in fee of the premises in question and of the other moiety of *Truckwell Estate*, and being possessed of personaity, on the 16th of *March* 1786 made his will of that date, duly executed and attested to pass real estates, in the following words; as touching

E. C. by his will, after making several pecuniary bequests, devised to *A. W.* the income of a certain cottage and her living in it if she thought proper and to *E. W.* the half of a certain estate; and all the rest and residue of his goods &c. and also his lands &c. he gave to his wife for life, with power "to give "what she "thought "proper of her "said effects;" to her sisters the said *A. & E. W.* for their lives; and after the death of his

wife and her two sisters he gave all his lands &c. to his heir at law. Held that the widow had power to devise to her sisters the real as well as personal estate before bequeathed to her by her husband; and *A. W.* having died before the widow, that the latter might among the rest bequeath the cottage, in which *A. W.* had a life interest, to her other sister *E. W.*

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such worldly estate and effects wherewith it hath pleased God to, blefs me I give and dispose of the same in manner and form following; (after giving several pecuniary legacies to his relations), “ Also I give unto *Ann White* my sister in law 20 L. and the incomes of *Burge's Cottage*, and her living in it if she think proper, during her natural life. Also I give unto *Eleanor White* 100 L. and half of *Truckwell Estate* during her natural life. Also I give unto *William Burge* my servant man 5 L. All the rest and residue of my goods chattels rights credits personal and testamentary estate, and also my lands tenements and hereditaments I give devise and bequeath unto *Elizabeth Chilkott* my dearly beloved wife during her natural life, whom I make my sole executrix. And I do allow her the said *Elizabeth Chilkott* to give what she thinks proper of *her said effects* to her sisters *Elinor White* and *Ann White* during their natural lives. And after the above lives being expired, viz. *Eliz. Chilkott*, *Elinor White* and *Ann White*, all the lands rights profits and hereditaments of *Truckwell Estate* to come to *John Chilkott* my kinsman living in *London* (a) or his male heir; if any free land, not to be sold or mortgaged on any account whatsoever, but to remain in the *Chilkott* family for land of inheritance, with two cottages garden and orchard in the parish of *Brompton Ralph* adjoining to the aforesaid *Truckwell Estate* called by the name of *Middle Whetcombe Free Land*. And if no male heir lawfully begotten by the said *John Chilkott* then the above lands to fall to the first male heir of the branch of my uncle *Richard Chilkott's* family, who lived at *Henrick Farm*; yielding and paying to such of the daughters of the aforesaid *Richard Chilkott* which shall be then liv-

(a) To whom the testator had before given a pecuniary legacy.

ing the sum of 100*l.* each, at the time of taking possession of the aforesaid estates." The testator died on the 24th of May 1787 so seized of his several estates.. *Elizabeth Chillcott* his widow, and her sisters, *Eleanor* the defendant, and *Ann White* surviving him. The lessor of the plaintiff the said *John Chillcott* at the time of the testator's death was and is now his heir at law. On the death of the testator *Ann White* entered into *Burge's Cottage*, *Eleanor White* into the moiety of *Truckwell Estate*, so devised to them respectively, and *Elizabeth Chillcott* (who proved the will and took possession of all the testator's personalty) entered into the residue of the real estates. *Ann White* died on the 9th of April 1791, in the lifetime of *Elizabeth Chillcott*, who thereupon took possession of *Burge's Cottage*; and on the 23^d of April 1792 made her will duly executed to pass real estates; wherein reciting the will of her husband and the power thereby given to her "to give what she thought proper of the said effects (of her husband) to her sisters *Eleanor White* and *Ann White* during their natural lives;" and reciting also the death of *Ann White*, she thereby, in pursuance of the power reserved and of all other powers wherewith she was either in law or equity invested, gave and devised unto her sister *Eleanor White* for her life "all such goods chattels rights credits personal and testamentary estate lands tenements and hereditaments as she was empowered under or by virtue of the said recited will of her said deceased husband to give and devise." She also devised unto her said sister *E. W.* "all the rest residue and remainder of her goods and chattels rights and credits real and personal estate and effects whatsoever and wheresoever, of what nature or quality soever, subject to and charged with the payment of her debts and funeral expences." And appointed her said

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sister *E. W.* sole executrix, and residuary devisee. On the 25th of *December 1795 Elizabeth Chillcott* died, on whose death the defendant *Eleanor White* proved the will, took possession of the whole of the personalty, as well that which was *Emanuel Chillcott's* the testator's, as that which was of *Elizabeth's* own acquiring, and entered into all the real estate which was in *Elizabeth Chillcott's* possession, and still holds the same. The question was whether the lessor of the plaintiff was entitled to recover the whole or any part of the above premises. If the Court were of opinion he was entitled to the whole, the verdict to stand for the whole; if to part only, the verdict to stand for such part; if to none a nonsuit to be entered.

Dampier, for the plaintiff, contended that *Elizabeth Chillcott* had no power under the will of *Emanuel Chillcott* to dispose of any part of the real property. The testator only allowed his widow to give "what she thought proper of her said effects" to her sisters for their lives; and the word *effects* will not carry land. It is usually applied only to personalty, and the testator has so applied it in his will; for at the beginning of his will he used the word *estate* with reference to his real, and the word *effects* with reference to his personal property. It may be said that *Emanuel Chillcott* having before given both real and personal property to his widow, the words "*said effects*" must apply to both; but that is not necessarily so; and if the meaning of the will be only doubtful the Court will construe it in favour of the heir at law. It is true the lands &c. are devised over to the heir at law after the decease of the two sisters as well as his widow; but he had before given to each of the sisters an interest in part of the landed estate, which is sufficient to satisfy those words.

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At any rate the lessor of the plaintiff is entitled to recover *Burge's Cottage*, which the testator had given to *Ann White* for her life, and which therefore cannot be said to be any part of "her" (the widow's) "said effects" not having been before bequeathed to her; and of such part only as had been before devised to herself was the widow allowed to make any further disposition.

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against
White.

Tripp contra was stopped by the Court.

LORD KENYON C. J. It is very plain what the testator meant. After giving a few legacies and bequests he devises all the residue of his property both real and personal of every description to his widow for her life, and then allows her to give what she thinks proper of her *said effects* to her sisters for their lives. This description must apply to the property which he had been before dealing out, amongst which *Burge's Cottage* is mentioned by name; the income of which he had given to *Ann White*, and her living in it if she thought proper (a); over all of which not before disposed of he meant to give his widow a control. And this is confirmed by the terms of the devise to the heir at law, who is not to take any thing till after the death of all the sisters.

Per Curiam,

Judgment of nonsuit to be entered (b).

(a) A devise of the *free use* of lands will pass the interest in them. *Cook v. Gerrard*, 1 Saund. 186.

(b) So the word "*legacy*" in its ordinary signification is applied to money; but it may signify a devise of land. Per Lord Mansfield in *Brady v. Cubitt*, Dougl. 40. S. P. Per Lord Macclesfield in *Beckley v. Newland*, 2 P. W. 182. S. P. Per Lord Camden in *Williamson v. Hurst* and others in Chan. M. 7 Geo. 3. MS. S. P. in *Hope v. Taylor*, 1 Burr. 268.

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Monday,
Nov. 17th.

The KING against CLARKE.

It is no objection to relators applying for a quo warranto information against the defendant for exercising the office of an alderman (his election to which they had opposed), that they afterwards made no opposition to his election to the principal office of magistracy, (to which the other was a necessary qualification); or that they afterwards attended at and concurred in corporate meetings where he presided, or where he attended in his official character. Such application being made within the time limited by law, viz. in 4 years after the defendant's election as an alderman.

THE defendant was called upon by a rule to shew cause why an information in nature of a quo warranto should not be exhibited against him, to shew by what authority he claimed to be an alderman of the borough of *East Retford* in the county of *Nottingham*.

The borough consists of two bailiffs, twelve other aldermen, and an indefinite number of burgesses. And thus far the affidavits on both sides agreed as to the right of election of an alderman, that the bailiffs aldermen and burgesses for the time being or the greater part of them should, upon a vacancy, elect one of two burgesses who should be submitted to their choice by a certain select body in the corporation; but by whom that nomination was in the first instance to be made was a subject in controversy, and not material to be here considered. In general it appeared that the election of the defendant was made under circumstances of great doubt and confusion, after the senior bailiff and many of the corporators had left the Common Hall, having just before proceeded to the election of one *Chapple* to fill the vacant office of alderman, which election however was afterwards set aside upon proceedings had against him for that purpose.

But the principal ground on which the present rule was opposed was that of the acquiescence of the seven relators, upon whose affidavits the rule was obtained, who were burgesses of the borough; as to which the circumstances appeared to be these: The election of the defendant to the

the office in question took place in *July* 1795, and it was not pretended that any of the relators concurred in the act of his election, but on the contrary left the Hall after the election of *Chapple* in which they had taken a part. The affidavits against the rule then stated that the defendant, having been at first sworn in before the junior bailiff only, had an information in nature of a *quo warranto* filed against him, to which he entered a disclaimer on that account; but afterwards in *Trinity Term* 1796 obtained a writ of *Mandamus* requiring the two bailiffs to permit him to be sworn into office before them, which was accordingly done towards the latter end of 1796; since which he had always exercised his said office. That on the 29th *September* 1798 he had been elected into the office of senior bailiff (which can only be holden by an alderman of the borough) by a majority of the bailiffs and aldermen, in whom the right of election is vested, and had served the office for one year. That the relators were at the several times of his nomination election and swearing in as aforesaid respectively burgesses of and residing within the town, and well acquainted as was believed with all the circumstances of the defendant's nomination and election, and of his obtaining the said writ of *Mandamus*, and of the oath so administered to him before the two bailiffs; and of his being afterwards elected into and serving the office of senior bailiff; those circumstances being publicly known and discoursed of in the town and neighbourhood; and have acquiesced in all those transactions as aforesaid until the present application: and that the said relators have also attended corporate meetings and elections of junior bailiffs and aldermen, at which the defendant was present both as alderman and senior bailiff, and that they had voted on such occasions; and that they never ob-

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jected to the defendant's giving his vote as alderman on such occasions.

Gibbs and Yates for the defendant, having first argued upon the merits for the regularity of the election, then contended that, even admitting it to have been irregular, yet after an acquiescence for so long time on the part of the whole corporation, including the present relators, they were now estopped from objecting to it. No opposition was made to the Mandamus to swear in the defendant in the first instance, nor to his subsequent election to the office of senior bailiff, which can only be holden by an alderman, and which was therefore a recognition of his title as alderman. And since that appointment several elections of aldermen and others have been made without any question, all which derivative titles will be destroyed if the defendant be ousted. As before the late act of the 32 Geo. 3. c. 58. the Court often refused applications, from mere lapse of time, within twenty years, which was the period of limitation at that time; so neither was that statute intended to limit the discretion of the Court in refusing applications of this sort within six years, the limitation thereby fixed. In the *Winchelsea* case (a) when the Court, by analogy to the statute of limitations in respect of ejectments, laid down the rule, "that they would not give leave to a common relator to commence a prosecution in the nature of a quo warranto after an acquiescence of twenty years, they observed at the same time that though the acquiescence might be short of that period, they would not therefore grant an information, unless it appeared to be a proper case." The same rule

(a) 4 Burr. 1962, and the MS. note of Mr. Justice Yates, from whence the quotation was made.

was also fully explained in the case of *The King v. Wardroper*, M. 7 G. 3. (a) one of the *Winchelsea* cases. The Court there were unanimously of opinion that the rule ought to be discharged with costs. "They admitted that no length of time will establish a right against the crown; and that if his majesty's Attorney General were to file an information on behalf of the crown, the defendant's long enjoyment would be no bar, without shewing a good title. But when the information is only by a common relator, who cannot proceed without the leave of the Court, a long acquiescence in the defendant's right may operate upon the discretion of the Court, and induce them to refuse their own leave for so stale and ill-timed a prosecution. If the Court were of course to grant every information that is asked, the stat. of *Queen Ann* which requires the Court's leave before a relator can commence a prosecution would be virtually repealed, and the Court deprived of the discretion reposed in them. The view of that statute was on the one hand to facilitate and speed the removal of usurping officers and pretended corporators; and on the other hand, to restrain all improper and vexatious prosecutions, by putting it in the power of the Court to refuse their leave. The stat. 4 & 5 *Wil.* and *Mar. c.* 18. has reposed in the Court the same discretionary power over criminal informations. The title of that act is an act to prevent malicious informations; and with that view it directs that the clerk of the crown shall not receive or file any informations without the express order of the Court. And though the words of that statute relate only to informations for trespasses, batteries, and other misdemeanors; yet it was holden in the case of the *King*

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(a) This was also read from Mr. Justice Tate's MS.

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and *Morgan* (a) that under the word misdemeanors it extends to informations in the nature of a quo warranto: for an usurpation of an office or franchise is a misdemeanor, and liable to a fine. It is evident therefore that the Court have a right to use their own discretion, and to grant or refuse an application of this kind according as they shall think it expedient or not. The next consideration is, Whether upon the case now disclosed it would be proper to permit the prosecution applied for? It has been said that this case does not reach the limitation of time which the Court have set against these applications; for it is not yet 20 years since the defendant was elected. In drawing that line the Court only meant it as a boundary they would never exceed; that is, they would in no case permit any common relator to disturb a corporator after a quiet enjoyment for twenty years. But it is not from thence to be inferred that they would grant informations wherever the enjoyment has been less than 20 years. They will still examine into the propriety of the prosecution under all its circumstances, and grant or refuse it as shall seem most expedient upon the whole." In *R. v. Dawes*, and *R. v. Martin* (b), two other of the *Winchelsea* causes, where the Court entered into the same considerations, they laid considerable stress on the circumstance, that one of the relators, though he had not originally voted for *Dawes*, had afterwards voted with him at subsequent corporate assemblies; and that *Dawes* had afterwards been elected mayor unanimously, and many derivative titles would be affected by the flaw in his title;

(a) *Carth.* 503.

(b) 4 *Burr.* 2122. This was also read from the same MS. as the reasons of Mr. Justice Yates for assenting to the judgment there pronounced.

and

and for these reasons, although the irregularity of *Darves'* title was not denied even by himself, the rule for granting the information was discharged. Mr. Justice *Vates'* opinion was noted by himself in these words. After stating all the circumstances; "In all questions of this kind one great distinction is always to be attended to, that these are applications by common relators, who having no inherent right of prosecution but by the statute of Queen *Ann* are left to the discretion of the Court whether they shall be permitted to prosecute or not. In the exercise of this discretion the Court is not merely to consider the validity or defect of the defendant's title, but the expediency of allowing or stopping the prosecution under all its circumstances. If informations were always to be granted whenever a defective title is shewn, there would be an end of the statute and of all discretion reposed in the Court. The crown has indeed at all times a right to inquire into the claims of any office or franchise, and to remove the parties unless they can shew a complete legal title. But if every common relator might disturb corporations whenever he pleases, the vexations and mischiefs of so unlimited a privilege would be infinite. It was therefore one view of the statute of Queen *Ann* (connected with the stat. 4 & 5 of *William and Mary*) to lay some restraint on those prosecutions by requiring a previous leave from the Court in a matter of so general extent, and which is so often the subject of the most spirited litigations. It is much to be wished that some certain lines could be drawn, and the discretion of the Court in some degree confined. It is indeed very difficult to do it, as every different case has its own peculiar circumstances, and from those the Court must determine upon each. But the present occasion suggests the propriety of a few general rules; which if they

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they be not always decisive will at least have great weight and influence with the Court. 1st. If the objection upon which the application is founded has been known and acquiesced in by the whole corporation a great number of years, it is a reason for not suffering any member of that body to impeach a title which themselves have so long and knowingly admitted. The acquiescence of the corporation would indeed give no right to the party, if his title be really defective in itself; but it is a reason why those who have suppressed that defect such a great length of time should not afterwards be admitted as common relators. The great view of the statute of Queen *Ann* in the privileges it allows to common relators was to hasten the removal of usurpers, and thereby prevent the ill consequences that might ensue from such usurpations; but those who have lain by and permitted the usurpation a great number of years can have no claim at all to the benefit of that act. In such a case, the application would appear to be dictated by some impure motives, some change of interests in the parties applying, which a court of justice will never assist. They will therefore leave it wholly to the crown alone to dispute the title. 2dly. If the parties applying for leave to prosecute did themselves give their vote for the very man they object to, and have all along concurred with him in many corporate acts without ever excepting to his title, this is also a reason for not allowing those parties to contradict their own conduct, by impeaching a title which themselves created, or have knowingly admitted. 3dly. The nature of the objection may be another reason for rejecting a stale prosecution. If the objection be vague and indefinite in its nature, depending upon evidence which the distance of time may render more difficult or uncertain, and consequently the defence more embarrassed,

it might lay very unreasonable difficulties upon the defendant, if every common relator might put him upon answering it at the distance of 18 or 19 years. 4thly and lastly, If the prosecution proposed instead of reforming the constitution, and introducing good order and regularity into the corporation, would throw the whole body into general confusion, the Court would hardly suffer a common relator to commence a prosecution of so mischievous a nature."

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The Court desired the counsel in support of the rule to confine themselves to the objection made to the prosecution of these relators; saying that as to the validity of the election they would not take upon them to decide it in this stage; it was enough to say that it was sufficiently doubtful to put it in a course of inquiry before a jury.

Perceval and *Balguy*, in support of the rule, said that it would be carrying the doctrine of acquiescence a great length to conclude the application by the present relators, because they had not been in a situation to litigate the defendant's title for four years, being two less than the limitation allowed by law. It is not pretended that they had voted for the defendant's election as alderman, which they now sought to impeach; but as far as they could they opposed it by voting for another candidate. The expence of such prosecutions is considerable, and it may not be convenient to parties to incur it immediately after an election: but if their attendance afterwards in conjunction with the party so elected at annual corporate meetings be a ground for denying their application, the statute which gives them leave to apply within six years will be rendered nugatory: for such elections are indispensably

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penably necessary in order to carry on the government of the place, and it is the duty of every corporator to attend. In the cases cited some of the relators who applied had been concerned in the very acts which they came to impeach, which furnishes a leading line of distinction whereon the Court has frequently acted. But here the relators opposed the defendant's election as alderman. Neither is it sworn that any of them actually concurred in his election as senior bailiff, though they might not have openly opposed it. They were then stopped by the Court.

Lord KENYON C. J. The legislature have lately had this subject under revision, and have thought proper to draw a line of limitation of six years, after which no corporator's title shall be impeached for any original defect in it. This is a most wise and beneficial rule; and it is fit that our discretion should be governed by the same limitation in ordinary cases, so as not unnecessarily to fetter these applications beyond what the legislature have thought proper to do. The Court have indeed on several occasions said, and said wisely, that they will not listen to a common relator coming, though within the time limited, as a mere stranger to disturb a corporation with which he has no concern (a), nor even a corporator who has acquiesced or perhaps

(a) In the case of the *King v. Kemp*, II. 29 G. 3. a similar application was made against the defendant for claiming &c. to be a freeman of the borough of *Seaforth*, at the relation of one *Watts*, who was a stranger to the corporation, and who rested the application on his own affidavit, which was insisted on as a preliminary objection to granting the rule; though there was also a sufficient answer given upon the merits. The Court discharged the rule with costs. And Lord *Kenyon* C. J. in delivering his opinion; after shewing that *Watts'* affidavit had been completely answered, said, "Then it is to be considered who *Watts* is. If he had shewn that his own and other persons' privileges had been injured, he would perhaps have had reason for preferring this complaint; but the fact is otherwise.

perhaps concurred in the very act which he afterwards comes to complain of when it suits his purpose: and so far I think we have determined rightly. But I have never known the restriction carried further; nor am I prepared to carry it to the length now contended for. It is said these parties are concluded from impeaching the defendant's title, because he has been since elected senior bailiff without their opposition, and because they have attended other corporate meetings with him. But I cannot impute this as blame to them. There must be magistrates, and the powers of Government cannot stand still till the validity of a former disputed election is ascertained. In some corporations, whose charters contain non-intromittant clauses, justice would be at a stand if such elections did not take place. The necessity of a government *de facto* is recognized even in the instance of title to the crown by the stat. passed in the reign of Hen. 7th (a). In this instance therefore the relators having objected to the defendant's election to the office of alderman at the time, I cannot think that their not having opposed his election since to a necessary annual office of magistracy is such an acquiescence in the original defect of his title as precludes them from making this application within the time allowed by law. With respect to the merits, the question is put too much in dubio by the affidavits on either side for the Court to say that it is not proper to be inquired into by a jury.

Per Curiam,

Rule absolute (b).

(a) 11 H. 7. c. 1.

(b) So late as in *M. 29 Geo. 3.* the Court held in the case of the *King v. Bond*, 2 Term Rep. 767. that no possession of a corporate franchise for less than 20 years

was

otherwise. He comes here as a perfect stranger to the corporation, prowling into other men's rights. I do not mean to say that a stranger may not in any case prefer this sort of application; but he ought to come to the Court with a very fair case in his hands."

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was *of itself* a sufficient objection to the granting of an information in the nature of a quo warranto: and it was granted there after a possession of 12 years. It was there also considered to be no objection to the application that the defendant's title had been before attacked by a similar information which was afterwards abandoned. Afterwards in the case of the *King v. Dickinson* in *H. 31 Geo. 3. 2 Term Rep. 284.* the Court came to the resolution of leaving in future their own discretion in granting applications of this nature to six years, beyond which they would not under any circumstances suffer a party's title to be impeached. And they acted upon this rule in the case of the *King v. Placok* in *E. 32 Geo. 3. 2 Term Rep. 684.* soon after the stat. 32 G. 3. c. 58. was passed, which stamped the propriety of it with legislative authority.

*Tuesday,
Nov. 18th.*

SHERREFF and Another against WILKS (originally sued with G. BISHOP and W. ROBSON, who have been outlawed in this suit).

Two (of three) partners, who had contracted a debt prior to the admission of the third partner into the firm, cannot bind him without his assent by accepting a bill drawn by the creditor upon the firm in their joint names, but such security is fraudulent and void as against the third partner, and cannot be recovered in an action against the three, wherein one only of the original partners pleaded to the action.

THIS was an action upon the case upon a bill of exchange for 78*l.* dated the 5th of *November 1796*, payable to the order of the plaintiffs two months after date, which was stated in the declaration to have been drawn by them on the said *G. Bishop, W. Robson and J. Wilks* by the name and description of Messrs. *George Bishop and Company*, and to have been accepted by them. The defendant *Wilks* pleaded the general issue, on which issue was joined.

The cause came on to be tried before Lord *Kenyon* at *Guildhall* on the 5th of *June* last, when the jury found a verdict for the plaintiffs for 90*l. 10s.* including interest on the bill; subject to the opinion of this Court on the question, whether the plaintiffs were entitled to recover under the circumstances of the case?

- The plaintiffs in *October 1795* sold and delivered a quantity of porter to *Bishop and Wilks*, who were then partners, which porter was entered in the plaintiffs' books

in the names of *Wilks* and *Bishop*; and the same was afterwards shipped for the *West Indies*, and the defendant *Wilks* paid the shipping charges. *Robson* became a partner with *Bishop* and *Wilks* in April 1796, and continued so till the 8th of *November* following, when their partnership was dissolved. The defendant *Wilks* previous to the dissolution of the partnership sent to the plaintiffs a memorandum or calculation in his own hand writing of certain deductions claimed by him in respect of the porter. The balance due to the plaintiffs in respect of the porter was 78*l.* for which the plaintiffs drew upon the defendants the bill mentioned in the declaration, which bill was accepted by *Bishop* in the partnership firm of all the defendants, by his subscribing thereon "Accepted G. B. and Co."

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Lawes for the plaintiffs. As between the plaintiffs and *Bishop* and *Wilks* the original partners by whom the debt was contracted, it must be admitted that *Wilks* is bound by *Bishop's* acceptance, though it were made without his concurrence, because one partner may bind another by accepting a bill on account of a partnership debt. It is true that one partner cannot pledge the security of another for his own private debt (a), nor if there be any fraud in the transaction as between him and the creditor to whom such security is given: but this was a debt incurred in the course of trade and not of an individual or private nature. And no fraud is found here, nor can any inference of fraud arise from the facts stated. The creditors were guilty of no imposition in drawing the bill originally, nor

(a) *Gregson and others v. Hutton and Fextrest*, B. R. E. 22 Geo. 3. *Marsb v. Vanommer* and another. Sittings after *Mich. T.* 1786, at *Guildhall*, cor. *Buller J.*

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could they control the manner in which it was to be accepted: but when accepted by any one of the house in their joint names they must all be bound by it in the ordinary course of commercial dealings. - If *Wilks* would have been bound, though he did not concur in the act of acceptance, and if the partnership fund were originally answerable to the plaintiffs, the introduction of a third partner cannot vary the case; it was only the continuance of the old partnership with the addition of a new member; and the bill was drawn on the fund which really and truly ought to pay it. The debt as between the defendants must be taken to have been transferred to the new partnership: but whether that were so or not is a matter to be settled between themselves, with which the plaintiffs have no concern. With regard to creditors the act of one partner must be taken to bind all the rest, otherwise all dealing with them must be attended with great perplexity. It may not be known to many at what time such a partner was taken into the firm.

Gibbs contra was stopped by the Court.

LORD KENYON C. J. I do not know how this case came to be reserved for the opinion of the Court; for I have decided the same question repeatedly at the sittings, and the propriety of my decision has never been canvassed again upon a motion for a new trial. This is an action brought against three persons, *Wilks*, *Bisshop*, and *Robson*, as acceptors of a bill of exchange. It appears that the acceptance was in fact made by *Bisshop* alone in the name of the firm. The consideration for this bill was some porter which had been sold by the plaintiffs to *Wilks* and *Bisshop* only, at a time when *Robson* had no concern with

the house. Then the plaintiffs, knowing this, draw the bill upon all the three partners; and knowingly take an acceptance from one of them to bind the other two, one of whom; *Robson*; had no concern with the matter and was no debtor of theirs; no assent of his being found, and nothing stated to shew that he had any knowledge of the transaction. It is hard enough for one partner in any case to be able to bind another without his knowledge or consent; but it would be cartying the liability of partners for each other's acts to a most unjust extent if we suffered a new partner to be bound in this manner for an old debt incurred by other persons. The plaintiffs therefore ought not in justice to have taken this security by which they were to bind one who was not their debtor: the transaction is fraudulent upon the face of it. It is no answer to say that one partner has a general power of binding the rest. So an executor has power to bind the assets of his testator, and to sell and dispose of his effects; and the law reposes a confidence in him that he will apply the proceeds in payment of the testator's debts and legacies: but if fraud could be proved in any particular transaction between the executor and a purchaser such a sale would be void. In the case of *Worfeley v. De Mattos* (a), Lord Mansfield, in delivering the opinion of the Court, says, that "valid transactions as between the parties may be fraudulent by reason of covin, collusion, or confederacy, to injure a third person:" and he instances, "if a man, knowing that a creditor has obtained a judgment against his debtor, buy the debtor's goods for a full price, to enable him to defeat the creditor's execution, it is fraudulent. Again, if a man, knowing that an executor is wasting and turning the testator's estate into money, the more easily

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(a) 1 Burr. 474, 5.

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to run away with it, buy from the executor with that view, though for a full price, it is fraudulent." The same doctrine was recognized by Lord *Hardwicke* in *Mead v. Lord Orrery* (a); and again by Lord *Mansfield* in *Whale v. Booth*, cited in the notes of the report of *Farr v. Newman* (b); and also in the case of *Ellist v. Merryman* (c), and in other cases. And nothing can be better established as a general rule than that the law will set aside every con-

and *Bishop* owed money to the plaintiffs; these latter, knowing that *Robson* had no concern with the matter, fraudulently receive from *Wilks* and *Bishop* a security by which *Robson* is to be bound: this therefore cannot be enforced in this action.

GROSE J. This is a mere fraudulent attempt to make *Robson* pay the debt of *Bishop* and *Wilks*; and the plaintiffs shall not be permitted to avail themselves of a security so obtained in order to bind a man without his assent for the payment of a debt who owed them nothing. And the security being void against *Robson*, the plaintiffs cannot recover in this action against the three, wherein if he obtained judgment he might sue out execution against any of the defendants.

LAWRENCE J. The plaintiffs in this action declare as upon a promise by three defendants, and consequently to entitle themselves to recover they must prove a promise either express or implied binding upon all the three: in this they have failed, and therefore there must be judgment against them. In addition to the authorities cited

(a) 3 Atk. 235, 74. (b) 4 Term Rep. 625. (c) 3 Barnard. Ch. Rep. 81.
 Vide *Crane v. Drake*, 2 Vern. 616.

by my Lord to shew that *Robson* was not bound by this act of his partners, is the case of *Hope v. Cuff*. [He then read the following note from a MS. of the late Mr. Justice *Buller*, taken by him, when he was at the bar.] “*Hope v. Cuff*, Sittings at *Guildhall* after *Mich.* Term 1774. Mr. *Fordyce*, who traded very largely in his separate capacity as well as in the business of a banker in partnership with others, having considerable dealings in his private capacity with *Hope* and Co. in *Holland*, did, for and in the names of himself and partners, give them a general guarantie for the money due from him in his separate capacity. *Fordyce* became a bankrupt, and afterwards all the partners became bankrupts. And a bill was filed in the court of Chancery by *Hope* and Co. in order to have the benefit of this guarantie: upon which that court directed an issue to try the validity of it. L^d MANSFIELD in summing up the evidence to the jury said, there is no doubt but that the act of every single partner in a transaction relating to the partnership binds all the others. If one give a letter of credit or guarantie in the name of all the partners it binds all. But there is no general rule which may not be infected by covin, or such gross negligence as may amount to or be equivalent to covin: for covin is defined to be a contrivance between two to defraud or cheat a third. Therefore the whole will turn on this, whether the taking the guarantie from *Fordyce* himself in his own hand writing, without consulting the other partners or having their privity, is not such gross negligence in the *Hopes* as will amount to a fraud or covin. *Fordyce* was acting in two several capacities, having transactions in his own name only, for his own separate benefit, and in the names of the partnership for his own benefit. This case comes

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out of Chancery, where an affidavit or answer of all parties might have been had if necessary; but none such has been produced, and therefore it must be taken that the partners knew nothing of it, and had no profit by it, or privity in the transaction. Another fact to be granted is, that as between *Hope* and Co., and *Gurnal* and Co. and *Fordyce*, the whole transactions are avowedly with *Fordyce* only in his separate capacity. The next fact is the correspondence in 1770, preceding the second guarantie. It is clear that *Fordyce's* deposits and interest in the funds were both doubted, and then the *Hopes* tried to make a scheme to get a second security without shocking him, by suggesting there was a new partner. The first guarantie was given in 1764, and that never had been called in, and still existed. There was then no occasion for a new one: for the change of a partner and taking in a new one would not destroy a former guarantie. The scheme was to get security for debts not well secured, the goodness of which was doubted; and they therefore get this from *Fordyce* alone, clandestinely, without the knowledge of his partners. If the fact be clear that *Hope* and Co. and *Gurnal* and Co. knew that this was done to cheat the partners of *Fordyce*, there is no question in the cause. But it is manifest that they trusted to it as binding on the partnership. Therefore this brings it to the second question, Whether it be not a gross negligence; especially as they knew at the time that *Fordyce* was acting in his separate capacity; and this security was intended to indemnify them against his separate debts. Verdict for defendant. Lord *Mansfield* afterwards, in his report to the court of Chancery, on a motion being made for a new trial, said, three things were established to the satisfaction of himself and

and the jury. First, that the transactions between *Hope* and Co. and *Fordyce* were wholly on *Fordyce's* account. Secondly, That the partners of *Fordyce* derived no profit or benefit whatsoever from them. Thirdly, That they had no notice of the guarantie, and consequently did not acquiesce in it. And Lord *Mansfield* said he left it to the jury, whether under these circumstances the taking of these guaranties were, in respect of the partners, a fair transaction or covinous, with sufficient notice to the plaintiffs of the injustice and breach of trust *Fordyce* was guilty of in giving them."

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LE BLANC J. This case must be determined in the same manner as if *Rolson* had pleaded to the action. It seems admitted that if one of several partners pledge the partnership fund for his individual debt, that will not bind the rest. Now I see no difference between the case of one and the case of two of several partners pledging the joint fund for their individual debts; which is the case before us.

Postea to the defendant.

FARR against PRICE.

Tuesday,
Nov. 18th.

THIS was an action on a promissory note for 25 l. 5 s. dated the 14th of July 1797, payable to order three months after date. The declaration also contained the common counts. The note was given by the defendant to one *Jones* and by him indorsed to the plaintiff. At the trial before *Thomson* B. at the last Spring assizes for *Hereford* the only evidence produced was the note itself, which was objected to, as having a nine-penny instead of an eight-penny stamp, as required by the stat. 37 Geo. 3.

A promissory note written upon a stamp of greater value than the proper stamp required cannot be received in evidence, tho' the stamp were applicable to the same kind of instrument.

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c. 90. which was in force before the making of this note (a): a verdict was however taken for the plaintiff, reserving the question of law for the opinion of the Court.

Bevan obtained a rule in Easter term last, calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had. This was moved on the authority of *Robinson v. Drybrough*, 6 Term Rep. 317. where it was holden that articles of agreement under seal could not be given in evidence unless stamped with a deed stamp, although the respective stamps were of the same value.

Law shewed cause in the same term, and said that "as justice had been done in this case the Court would not disturb the verdict, according to the case of *Edmonson v. Mackell*, 2 Term Rep. 4. where the Court on that account refused to enter into the discussion of the question at law, That it was a case of peculiar hardship on the plaintiff, there having been no intention in this case to evade the duty, and more having been actually paid to the revenue than was necessary. That the case of *Robinson v. Drybrough* was so far distinguishable from the present that there the stamp used was of a different description from that required by law in the particular case, whereas here

(a) By the stat. 31 Geo. 3. c. 25. the stamp required on such a note as the one in question was 6*d.*, and for a note for above 30*l.* and not exceeding 50*l.* the stamp was 9*d.* The act of the 37 Geo. 3. c. 90. imposed an additional duty of 1*d.* on notes of the former description, and 3*d.* on those of the latter. The fact here was that the note being drawn soon after the passing of the last mentioned act, and before the general issue of the new stamps, was, to avoid any appearance of evading the law, written upon the nine-peenny stamp which was then appropriated to notes of greater value.

both.

both the stamp used and the proper stamp were applicable to the same kind of instrument; and some stress was there laid upon the appropriation of different duties to distinct purposes. Here too the stamp used was larger than was required: and in a late case in the Common Pleas, Lord *Eldon* had ruled that the larger stamp must be taken to include the smaller one.

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The Court thinking this a case of great hardship, where no fraud was intended; and it having been intimated to them that it was in contemplation to introduce a bill into parliament for affording relief in such cases, they ordered the matter to stand over in order to await the expected event. But nothing of that sort having occurred, the case was now called on again in the peremptory paper; when

Law again renewed his former arguments.

Lord KENYON C. J. We ordered this matter to stand over, not because we had any doubt upon the law, but to afford time to the plaintiff to get relief elsewhere. But however much it were to be wished that an ad valorem stamp would suffice in these cases, yet till the legislature so declare it, no other than the particular stamp appropriated by the law to the particular instrument can be deemed sufficient. The words of the stamp acts are express, and can admit of no other interpretation; and therefore it cannot make any difference in this case, that the stamp used was larger than was required, or was applicable to the same purpose.

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LE BLANC J. The ground of objection was truly this, that at the time when this note was made there was no such stamp in existence as a nine-penny stamp for a promissory note.

The other Judges assenting,

Rule absolute.

Lord KENYON then observed that as there were other general counts in the declaration, if the plaintiff could give other evidence of a consideration paid by him to the defendant, he would not be concluded from recovering by the fact of the defendant's having given this imperfect promissory note for it (a).

(a) Where a promissory note had been given for money lent, but when produced in Court was unstamped; Lord Kenyon C. J. permitted the plaintiff to recover on a common count for money lent, by proving that when the money for which the note had been given was demanded of the defendant, he acknowledged the debt. *Tyte v. Jones*, Sittings at Westminster adjourned to 29th of October 1788. So in *Alves v. Hodgson*, 7 Term Rep. 241. the Court held that the plaintiff could not recover upon a written contract for payment of wages made in Jamaica, which by the laws of that island was void for want of a stamp; yet that he might recover upon a count for a quantum meruit, because the written contract could not be received in evidence. Yet where the defendants, who had advanced money upon the security of a ship at sea, took an absolute conveyance of the property, which afterwards turned out to be defective and void by reason of its not being conformable to the statute 25 Geo. 3. c. 60. s. 17. directing such transfers of property to contain certain particulars; the Court held that the vendees could not retain the possession of the ship, which they had seized upon her arrival, by resorting to the general lien, which the possession of the grand bill of sale might otherwise have conferred on them; but that they were liable in trover brought by the assignees of the vendor who had in the mean time become a bankrupt. *Rolleston v. Hibbert*, 3 Term Rep. 406.

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The KING against The Inhabitants of CREDITON.

Wednesday,
Nov. 19th.

TWO justices by an order removed *William Milton*, *Mary* his wife, and *Mary* their daughter, from the parish of *North Tawton* to the parish of *Crediton*, both in the county of *Devon*. The Sessions on appeal confirmed the order, subject to the opinion of this Court on a case stating; That *William Milton* the pauper was bound apprentice to *Andrew Matthews*, whom he served above 40 days in the parish of *Crediton*. *Matthews* failing in business told the pauper he had no further employment for him and he might go where he pleased. Afterwards, and before leaving his master, one *Haydon* came to inform the pauper that one *Underhill*, who wanted a boy, was at an inn in the neighbourhood of his master's house, and that he should go to the inn. As the pauper was going out of the house, his master met him and asked him, where he was going? The pauper told him he was going down to *Underhill*. *Matthews* said "he might go there or where he pleased." Thereupon the pauper left *Matthews*'s house, and went and hired himself and lived with *Underhill* above 40 days in the parish of *Sampford Courtenay*, but no communication appeared to have taken place between the original master and *Underhill*. The question submitted by the sessions was, Whether this were such an assent of the original master to the apprentice serving *Underhill* as enabled the apprentice to gain a settlement in *Sampford Courtenay* by his service with *Underhill* there.

Where the master of an apprentice told him "that he had no further employment for him and he might go where he pleased," and the apprentice hearing of another master was going to him, and being met by his original master, and asked where he was going, answered that he was going to *U.*, to which the master replied "he might go there or where he pleased;" held this was not such a particular assent of the original master to the service with *U.* as would enable the apprentice thereby to gain a settlement, tho' the indentures were not delivered up or cancelled.

Gibbs and *Holland* in support of the order of Sessions contended that this was the case of a general licence from the master to the apprentice to serve whom he pleased. Neither party considered the indentures as subsisting, and conse-

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consequently no particular assent to the service with *Underhill* could have been in the contemplation of the master: Neither did the answer import any such assent. It meant no more than that the master no longer considered the pauper as his apprentice, and he might go where he liked. The case then falls within the principle of the case of *R. v. Sandford (a)*. There the indentures still subsisted in point of law, because the pauper was under age, and being a parish binding, it could not be put an end to without the assent of the parish officers; but the master having delivered them up, considering them as at an end, the Court held that the apprentice did not gain a settlement as such by serving another master, though at the recommendation of his original master; which was stronger evidence of assent to the particular service than exists in the present case. The Court then desired to hear the counsel for the appellants.

Clapp and *East*, contra, contended that the pauper gained a settlement by his service with *Underhill* under the indentures, by the consent of the original master. A particular leave is not inconsistent with a prior or concomitant general leave. It is clear that the apprenticeship still subsisted in point of law notwithstanding the general leave to the apprentice to go where he pleased, the indentures not having been either cancelled or delivered up; as in the case of *R. v. St. Luke's (b)*, and that class of cases (c); nor any consideration paid for the giving them up, as in *R. v. Harborton (d)*. The master might have recalled this general leave at any time and insisted upon the service of his apprentice. His subsequent assent to a particular service operates as such recall, at least pro tempore. Here was a particular assent to go and live with *Underhill*,

(a) 1 Term Rep. 281. (b) Burr. S. C. 542. (c) Vi. R. v. *Titchfield*, ib. 511. and *R. v. Notton*, ib. 629. (d) 1 Term Rep. 139.

though

though at the same time the master said he might go wherever else he pleased. A mere knowledge by the master of the particular service will not enure as a consent, but this is a previous permission to serve a particular person by name. The case of the *King v. Sandford* is distinguishable from the present; for there the indentures were actually delivered up, which rebutted any idea of a subsequent particular assent to the service with another master; and such was considered to be the ground of that decision in *R. v. The Holy Trinity in the Minorities* (a). But the mere circumstance of a prior general leave has never been considered as an objection to a subsequent particular leave as in *R. v. Fremington* (b). The case of *Tavistock v. Kelly* (c) is in point to shew that an assent to a particular service may operate to give a settlement though accompanied with a general leave to serve whom the pauper pleased. There the original master when applied to by one *Mason* to know whether it were with his own consent that the pauper should live with him answered, "with all his heart he might live with *Mason* or anybody else, provided he performed his agreement with him;" (which agreement was to pay him a guinea a-year during the remainder of the apprenticeship). This was holden to be a particular assent to the service with *Mason*. So in *R. v. Bradninch, Tr. 21 Geo. 3.* (d) leave was first given to the pauper to go and serve whom he pleased, notwithstanding which, after the pauper had entered into another service, the master meeting him, and telling him "it was a very good place for him, and he hoped he would continue in it," was holden to be such an assent to the particular service as enabled the pauper thereby to gain a settlement.

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(a) 3 Term Rep. 607.

(b) Burr. S. C. 416.

(c) Burr. S. C. 578.

1 Dlac. Rep. 635. S. C.

(d) Const. 594.

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Though neither in that case any more than in the present was the assent of the first master communicated to the second.

Lord KENYON C. J. The service with *Underhill* was not a prosecution of the service of the original master. Some of the cases upon this subject have been carried to a greater degree of refinement than might be desirable if they were to be decided again de novo; but we are to be governed by the general principle resulting from them, and not by particular expressions which vary in every case. It would perhaps have been better to have confined the power of gaining a settlement to a service with the original master. The case of the *King v. St. George's Hanover square* (a) first broke in upon that line, and determined that an apprentice serving another by the consent of the original master might thereby gain a settlement: from thence has ensued such a train of decisions as it is difficult to follow; however the general principle of them all is to be found in the *King v. Austrey* in *Burr*: S. C. 441. where Lord *Mansfield* said that in order to gain a settlement by the apprentice serving another master, there must be "an express and explicit leave and consent given by the master to the particular service," so as to be considered as "a service of his master under the indenture;" and not, as he observed in that case, "a leave intended to be quite general;" or as here, a general quitting of the service and leave to go where the pauper pleased. Here the master first tells the pauper he had no longer any employment for him and he might go where he pleased, and then somebody having sent for

(a) *Burr*. S. C. 12.

the pauper, he tells his master, on being asked where he is going, that he is going to *Underbill*, on which the master repeats in effect what he had before said, that he might go there or where he pleased; meaning that he no longer looked for his service or took any concern how he disposed of himself.

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GROSE J. There must be a particular consent of the original master to the service with another, in order to give a settlement. In the case of the *King v. The Holy Trinity in the Minorities* there was a particular recommendation to a particular service, which the Court held sufficient for that purpose. Whether there be such a particular assent of the original master to the subsequent service is more a question of fact than of law (a), and here the Sessions have in effect negatived that fact by finding that the pauper gained no settlement by the service with the second master.

• The other Judges agreed that the conversation stated did not import an assent by the master to the particular service; but was in effect no more than repeating what he had at first said, that he had no further occasion for the pauper, and he might go where he pleased.

Order of Sessions confirmed.

(a) Vide post. *R. v. The Inhabitants of Skebbeck*.

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Friday,
Nov. 21st..DAVISON and Another *against* GILL.

An order made by justices of peace under the st. 13 Geo. 3. c. 78. s. 19. for stopping up an old foot-way and setting out a new one must follow the form prescribed in the schedule annexed to the act, and set forth the length and breadth of the new foot-way: otherwise it is no answer to a justification of a right of way pleaded to an action of trespass quare clausum fregit brought by the owner of the soil over which the old way led. The statute requires that the form set forth in the schedule "shall be used on all occasions, with such additions and variations only as may be necessary to adapt it to the particular exigency of the case." Under these words a material variance from the form prescribed is fatal, and may be taken advantage of in a collateral proceeding.

TO trespass for breaking and entering the plaintiff's close called *Beck Meadow*, in the parish of *Arnold* in the county of *Nottingham*, the defendant pleaded the general issue, and a justification of a public footway over the said close; upon which issues being joined, the cause was tried at the last assizes at *Nottingham*. It was admitted that the defendant used the road mentioned in the pleadings subsequent to its being turned as hereafter stated; and the jury found a verdict for the plaintiffs subject to the opinion of this Court upon the following case. The road in question time immemorially has been used as a public footway leading from the town of *Arnold* in the parish of *Arnold* to the town of *Nottingham* through and over the said close of the plaintiffs' called *Beck Meadow*, until the same was stoppt up under the authority of two justices at a special session holden for that purpose on the 9th of *March* 1798 pursuant to a notice under their hands and seals dated 24th of *February* preceding; whose orders and proceedings have been duly inrolled by the clerk of the peace, and are as follows. "To his majesty's justices of the peace for the county of *Nottingham* to be assembled at their special sessions to be held &c. within the parish of *Arnold* in the said county of *Nottingham* on *Friday* the 9th of *March* 1798. Whereas there is now a certain foot-way or road leading from *Arnold* aforesaid towards *Nottingham* lying and being through certain lands and grounds called the *Beck Meadow* and *Beck Meadow End Closes*, within the said parish of *Arnold*, belonging to *Sarah Coape Sherbrook* gentlewoman and *Mrs. Mary Lomas* and her said

son *Samuel Lomas* respectively, and described in the plan hereunto annexed (a), "Old Foot Path." And whereas it would be more commodious to the public to have the said foot-path or road diverted or turned and stopt up, and to have the foot-way or road from *Arnold* aforesaid toward *Nottingham* to go in future on the common highway leading from near *Arnold Mill* into the turnpike road near thereto leading towards *Nottingham*, and from thence over part of a close or parcel of land belonging to the said *S. C. Sherbrooke* nearly opposite to *Daybrook* turnpike gate, and from thence along the said turnpike road leading towards *Nottingham*, as the same is now made convenient and commodious for people on foot, and described in the plan hereunto annexed "New Foot Path," in lieu of and in exchange for the said old foot-way or road; Now we the said *S. C. Sherbrooke Mary Lomas* and *Samuel Lomas* do hereby consent and agree; and also request, that the said old foot-way or road may from henceforth and at all times hereafter for ever be wholly stopt up and discontinued to be used as such, and that the foot-way or road from *Arnold* towards *Nottingham* aforesaid may go in future on the said new foot path above described in lieu of and in exchange for the said old foot-way or road. And each of us do hereby consent and agree that such new foot way or road, which is now put into a good state as such, shall or may at all times hereafter be used and remain as a foot-way or road, and become public to all intents and purposes whatsoever; and be maintained and

(a) There was a map of the new and old path annexed to the case, according to a certain scale as therein marked of a quarter of an inch to ten yards, whereby it appeared that the path was turned from the old direction across the fields, into the turnpike road which led round the same fields; from which road the path originally led and into which at some distance it came again.

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repaired by us and the owners of the said *Beck Meadow* and *Beck Meadow End Closes* for the time being, in proportion to our respective rights and interests in and upon the same; upon condition that the said old foot-way or road over the said lands or grounds belonging to us respectively be afterwards vested and become wholly and entirely the property of us, according to our respective estates and interests therein. In witness whereof we have hereunto set our hands and seals this 7th day of *March* S. C. *Sherbrooke*, M. *Lomas*, S. *Lomas*. Witness *J. Falkner*.

Nottinghamshire. We the Reverend *James Bingham* and *Charles Wylde* clerks two of his majesty's justices of the peace for the said county of *Nottingham*, at the special sessions within mentioned, having upon view found that the within mentioned old foot-way or road-way may be diverted and turned as within expressed and requested, and having viewed the new foot-way or road within mentioned, which we do hereby certify is completed and put into good condition and repair, do hereby order that the said old foot-way or road be diverted and turned in and upon the said new foot-way or road, in such manner as within particularly mentioned; and do order and direct that the said old foot-way or road shall from henceforth be stopped up or inclosed by the respective owners of the lands or grounds, through which the same hath hitherto gone; and all the land and soil thereof be vested in and become their property respectively, according to their respective estates and interests therein. Given under our hands and seals this 9th day of *March* 1798. *J. Bingham*, *Charles Wylde*.

Against this order there was an appeal to the quarter sessions, which confirmed the order of the justices.

The

The turning of the said new road over the close belonging to the said S. C. Sherbrooke nearly opposite to *Daybrook* turnpike is beneficial to the public. The question for the opinion of the Court is whether the plaintiffs are entitled to recover, if they are, the verdict for the plaintiffs to stand; but if not, then a nonsuit to be entered.

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This case was first argued in last *Trinity* term by *Clarke* for the plaintiff, and *Dayrell* for the defendant, when the Court ordered it to stand over with a view to an accommodation between the parties; which ultimately did not take place.

The objections then urged to the order of the magistrates stated in the case were these (a); 1. That it did not

(a) The st. 13 Geo. 3. c. 78. on which the objections were founded enacts (s. 19.) That "when it shall appear upon the view of two justices of the peace, that any public foot-way, &c. may be diverted, so as to make the same nearer or more commodious to the public, and the owners of the lands through which such new foot way, &c. is proposed to be made shall consent thereto, by writing under their hands and seals, it shall and may be lawful, by order of such justices at some special sessions, to divert and turn, and to stop up such foot-way, &c. and to purchase the ground for such new foot-way, &c. by such ways and means, and subject to such exceptions and conditions, in all respects, as herein beforementioned with regard to highways to be widened or diverted. And where such foot-way, &c. shall be so ordered to be stopped up, and such new foot-way, &c. set out and appropriated in lieu thereof, as aforesaid, it shall and may be lawful for any person aggrieved by any such order, or proceeding, &c. to appeal to the next quarter sessions, &c. after such order made, upon giving notice, &c. which court is hereby authorized to hear and finally determine such appeal. And if no such appeal be made, or, being made, such order shall be confirmed by the said court, the said way may be stopped, and the proceedings thereupon shall be binding and conclusive to all persons whomsoever; and the new foot-way, &c. so to be appropriated and set out, shall be and for ever after continue a public foot-way, &c. to all intents and purposes whatsoever

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not state that the new way was nearer or more commodious to the public than the old way. 2. It did not state the consent of the owners of the land over which the new path was turned, viz. the trustees of the public road. 3. The justices have not followed the form prescribed by

whatsoever; but no stoppage of such foot-way, &c. shall be made, until such new foot-way, &c. shall be completed and put into good condition and repair; and so certified by two justices of the peace, upon view thereof; which certificate shall be returned to the clerk of the peace, and by him enrolled amongst the records of the said court of quarter sessions: But from and after such certificate, such old foot-way, &c. shall and may be stopped up, &c. Sect. 69. enacts, That the forms and proceedings relative to the several matters contained in this act, which are set forth and expressed in the schedule hereunto annexed, *shall be used on all occasions, with such additions or variations only as may be necessary to adapt them to the particular exigencies of the case; and that no objection shall be made, or advantage taken, for want of form in any such proceedings, by any person or persons whomsoever.*

The schedule referred to (No. 21) gives the following form for such order:

“ Order of two Justices for diverting and turning a public Foot-way, &c. through the Lands of any Person who consents thereto.

Middlesex. WE A. B. and C. D. esquires, two of his majesty's justices of peace for the said county, at a special sessions held at _____ in the hundred of _____ in the said county on the _____ day of _____ 1800, having upon view found, that a certain part of a foot-way within the parish, &c. of _____ in the same hundred lying between _____ and _____ for the length of _____ yards, or thereabouts, and particularly described in the plan hereunto annexed, may be diverted and turned so as to make the same nearer (or more commodious) to the public; and having viewed a course proposed for the new highway, in lieu thereof, through the lands and grounds of _____ of the length of _____ yards or thereabouts, and of the breadth of _____ feet or thereabouts, particularly described in the plan hereunto annexed; and having received evidence of the consent of the said _____ to the said new highway, being made through his lands hereinbefore described, by writing under his hand and seal; we do hereby order that the said highway be diverted and turned through the lands aforesaid; and we do order an equal assessment” &c.

the act in the schedule, particularly in not having set forth the length and breadth of the new path; for want of which the public cannot know what they are entitled to use; nor if the way be out of repair, how much space is to be indicted. 4. The act requires two distinct orders of the magistrates in these cases, one for diverting the road and making the new road, and the other for stopping up the old road: And it appears from the act that the one is to depend upon the other; for the old road is not to be stopped up till a certificate from the magistrates that the new road is completed and put in good condition; which certificate is to be returned to the clerk of the peace and filed of record at the sessions.

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Lord KENYON, C. J. then observed that as to the consent of the trustees of the turnpike road, the soil was not vested in them, but remained in the persons who were entitled to it before the act passed by which they were appointed. The trustees have only the control of the highway. And here was nothing taken out of the highway by the order; but the old foot-path was merely turned into it, where the public had a right to go before. If that were out of repair, it could not be indicted as a foot-way, but according to the more extensive description which belonged to it as a way for carriages, &c. But all the Court thought there was great weight in the objection that the magistrates had not pursued the form of the order directed by the statute to be used.

Clarke for the plaintiff now contended, 1st. That the road had been legally stopped up by the order of the magistrates. Or if that were irregular, 2dly. That no advantage could be taken of it in this action. 1. The 69th

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sect. directing the form of the order set forth in the schedule to be used is merely directory; and if the substance of the order be preserved it is sufficient. The act was passed in case of the subject and is therefore to be construed beneficially, 2 *Vern.* 431.; and the same section enacts that no advantage shall be taken for want of form in the proceedings; which was unnecessary if the legislature had supposed that no other form than that appointed by themselves could be used; for that would of course be deemed sufficient. Per *Holt C. J.* in 12 *Mod.* 546. where an act says that justices of such division shall do so and so, it is only directory quoad the division, and any of the justices of the county may do it. And other cases to the like purpose are collected in 19 *Vin. Abr.* 516. Now here the order made has substantially complied with the act. The exact length and breadth is not required to be set forth, but the length and breadth *or thereabouts*. It is therefore mere form, of which no advantage can be taken. If the measure had been set out erroneously the order could not have been vacated on that account. But supposing it were necessary that some measure should appear on the face of the order, it does so appear here, by reference to the plan annexed where there is a relative scale of the admeasurement. [Lord *Kenyon* observed that the order did not state that the new path was set out according to the plan annexed; though the form in the schedule stated the length and breadth as well as referred to the plan annexed.] But 2dly, If the order were ever so defective advantage could only be taken of it on appeal; and the parties having missed their opportunity are concluded. The words of the statute are positive in this respect. By *s.* 19. The sessions are empowered to hear and *finally* determine the appeal; and if no appeal be

made or the order be confirmed on appeal, "the ways may be stopped up," and "the proceedings thereupon shall be binding and conclusive to all persons whomsoever." And by *ſ. 80.* the certiorari is taken away. These provisions would be rendered nugatory if the legality or propriety of the order may be canvassed again in an action of trespass; and the object of the legislature would be defeated, which was to place the jurisdiction over these matters entirely in the hands of the magistrates below. All that is necessary to appear on the face of the order is that the justices had jurisdiction to stop up the old way, and that they have done so, and set out a new one; the Court will not inquire in this collateral proceeding in what manner that jurisdiction has been exercised. The certificate required by the act has been given in this case; and it cannot be material whether or not it were made on the same piece of paper as the order itself.

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Dayrell contra was stopped by the Court.

LORD KENYON C. J. The Court are always disposed to support as far as they can the acts of the magistrates below; but we must take care not to let our wishes carry us beyond the bounds of law. The justices have a limited power given them under the act of parliament, and it must appear that this order was made by virtue of that power. The mode of proceeding chalked out in the 19th sect. was substituted in lieu of the old writ of *ad quod damnum*, which had become inconvenient from the expence and difficulty with which it was attended. A more compendious and easy method was thereby given; but still the substance of the old proceedings was to be preserved in all essential points: amongst others none was

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more essential than that the exact length and breadth of the new road should be set out, in order that the public might know with certainty what they had a right to use. This was formerly to be ascertained by the jury, as it is now under the act by the magistrates. It is accordingly provided for in the form set forth in the schedule to which the enacting part refers. And the words of the act are peremptory, "that the forms of proceedings set forth in the schedule annexed *shall be used* (not the usual words *shall and may*) on all occasions, with such additions or variations *only* as may be necessary to adapt them to the particular exigencies of the case." I cannot therefore say that these words are merely directory. Power is given to the magistrate to take away on certain conditions a right which the public before enjoyed; and this is to be done in a certain prescribed form with such additions or variations *only* as the locality of the description may require. Now here there is a material variance in the order from the form prescribed; for it does not set forth the length and breadth of the new path set out in lieu of the old one.

GROSE J. The form as it is called is in this case substance; because it is necessary that the public should know the length and breadth of the road which they have a right to use; the omission of which in the order is therefore a material defect, and shews that the justices of peace have not pursued the authority of the statute.

LE BLANC J. (a). Some of the proceedings under the statute are to be before a jury (b), who are to assess da-

* (a) LAWRENCE J. was absent this and the remainder of the term from disposition.

(b) Vi. f. 20, 21.

mages for the value of the land taken: But how can, this be done unless the length and breadth of the road are set forth in the order.

Postea to the defendant (c).

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(c) How far the judgment of a magistrate in a summary proceeding wherein he had competent jurisdiction is conclusive evidence even for himself in a collateral proceeding; *Vi Strickland v Ward*, Summer Ass. at Winchester 1767; *cor. Yates J.* cited in *Lovelace v. Curry*, 7 Term R. 631. 633.

The KING against The Inhabitants of SHEBBEAR.

Saturday,
Nov. 22d.

TWO justices by an order removed *John Bassett*, together with his wife and children, by name, from the parish of *Shebbear* to the parish of *Bradford*, both in the county of *Devon*. The sessions, on appeal, quashed the order, subject to the opinion of this Court on the following case. *John Bassett* the pauper was bound at seven years of age by a parish indenture to *William Trick* of *Bradford* till the age of twenty-four. *Trick* assigned the apprentice seven years afterwards to *John Sleeman* of the same parish, with whom he lived there till *Lady-day* 1780, when two months were wanting of the expiration of the apprenticeship. He then proposed to *Sleeman* to let him off the remainder of his time, which he at first refused to do: The pauper then offered to give *Sleeman* a guinea if he would let him off, which *Sleeman* agreed to do, and also to give him a new suit of clothes when the guinea was paid. The guinea was not paid to *Sleeman*; nor did *Sleeman* give the pauper the clothes: nor were the inden-

An apprentice offered his master a guinea "to let him off," to which the master agreed, and was also to give him a suit of clothes when the guinea was paid; but the indentures were not delivered up or cancelled. The guinea not being paid, the indentures still subsisted in law, and a settlement may be gained by serving another master with the consent of the first. The sessions ought properly to find the fact of such consent, and not merely evidence of it: But having found that on application by the apprentice to his

original master for leave to serve one *B.* (who would not take him without) the master said "he might go with all his heart, and that it would be a good thing for him to learn the trade;" this was holden sufficient evidence to warrant the conclusion of the sessions that the original master had consented to the particular service.

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tures given up or cancelled. On the morning of the *Lady-day* above mentioned the pauper went away and offered to serve one *Brent*, who refused to employ him, conceiving him to be an apprentice. The same day he went to one *Battisbill* a blacksmith in *Shebbear*, who said he would not take him without *Sleeman*'s consent. The pauper then went to *Sleeman* and told him what *Battisbill* had said: *Sleeman* then replied "You may go with all my heart, I think it will be a good thing for you to learn the trade." On his telling *Battisbill* what *Sleeman* had said, *Battisbill* agreed with him; and he lived with him in *Shebbear* for the last forty days and upwards before he attained the age of twenty-four.

East and *Lyon* in support of the order of sessions were stopped by the Court.

Clapp contra relied on the case of *The King v. Harberton (a)*, where an agreement by a master with his apprentice, then of full age, to give him up his indentures, was considered by the Court as amounting to a dissolution of the apprenticeship, and consequently no settlement could afterwards be gained by a subsequent service as an apprentice. It is true that a consideration was there paid to the master for the giving up to the apprentice the remainder of his time: but that cannot vary the case. The payment of the guinea here was not made a condition precedent to the relinquishment of the pauper as an apprentice, but only to the giving him the suit of clothes, which is usually done in the case of parish apprentices, such as the pauper was. The master by such an agreement parted with all

his control over the apprentice; and only stipulated that he should not give him the clothes till the guinea was paid. The contract was executed so far as depended on the master by his suffering the apprentice to depart from his service and enter into a new engagement. It was not necessary that the indentures should be delivered up or cancelled, according to the case of *The King v. Harberton* beforementioned. The subsequent conversation with the apprentice was not by way of giving an assent to the particular service; but only a confirmation by the master that he no longer assumed a control over the pauper.

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Lord KENYON C. J. This case is very distinguishable from that of *The King v. Crediton* (a), which we decided a few days ago: and upon the same ground on which we there held that no settlement had been gained as an apprentice by the subsequent service, I think it is as clear that the sessions have drawn the right conclusion in this case in adjudging that a settlement was gained by the service with the second master. There is no doubt but that the indentures still subsisted in point of law, not having been delivered up or cancelled, or any consideration paid for doing so. In the former case we were satisfied that the master did not really mean to give a particular assent to the second service: he had there told the apprentice to go where he pleased, having no further occasion for him; and when the apprentice told him where he was going, he answered that he might go there or any where else. But here the master was applied to for his consent to the particular person named; and he expressed his approbation of the apprentice going there, telling him that it

(a) Ante, 59.

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 ants of
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would be advantageous to him to learn the trade. This then was not an indiscriminate leave to serve any person, but a particular consent to a particular service; and this is the plain line of distinction between all the cases; which it is to be hoped will make an end of all such questions in future. Perhaps it would have been more correct for the sessions to have found the fact of such particular consent, instead of only finding the evidence of it, as they have done. And if any thing were likely to turn upon it in this case it should be sent down to them again to find that fact. But I do not know what advantage could accrue from thence to the respondents, for in effect the sessions have drawn that conclusion, and upon these premises I do not see how they could have drawn any other.

GROSE J. I am decidedly against sending this case down again to sessions, the only consequence of which would be to enhance expence: For I think that they clearly meant to find the fact of the original master's consent to the second service, and by their adjudication they have in effect found that fact; I have reconsidered what I said the other day in *The King v. Crediton (a)*, and am satisfied that it is right; namely, that whether there be a consent to a particular service or not is properly a question of fact for the sessions to determine. In the former case they virtually negatived the consent, as here they have found it; and I think the evidence warrants their conclusion.

LE BLANC J. The sessions having stated the fact, and drawn their conclusion, is equivalent to their having ex-

(a) Ante, 63.

precisely found an assent by the original master to the particular service with *Battisbill*.

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Order of sessions confirmed (a).

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(a) Vide *Rex v. Clipping Warden*, 8 Term Rep. 102.

PEARSON against RAWLINGS.

Saturday,
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THE latitat was returnable on the first return of *Easter* Term last; a declaration was delivered as of the 30th of *June*, but no bill was actually filed till the 3d of *July*, the day after term. The defendant, a prisoner, not being aware of the irregularity (a) at the time, pleaded in person on the same 3d of *July*: And being still in custody on *mesme* process, obtained a rule in this term calling on the plaintiff to shew cause why he should not be discharged out of custody, on the ground that a prisoner once superseable is always so.

A prisoner who is superseable, for want of filing a bill against him in time, waves the irregularity by afterwards pleading.

Erskine and *Gibbs* against the rule contended that the defendant had waved the irregularity by pleading afterwards.

Garrow and *Lambe* contra relied upon the general rule above stated, which was recognized in *Rise v. Christfield*, 1 Term Rep. 591. and admitted to apply to all cases where the prisoner remained in the same custody and under the same process, which was the case here. And they said that if such an implied waiver were admitted as

(a) By rule of Court, H. 26 Geo. 3. the plaintiff must declare against a prisoner before the end of the next term after the return of the process. Rules and orders of B. R. p. 37.

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an exception, the benefit of the rule which had been introduced for the sake of prisoners would be done away.

LORD KENYON C. J. The rule alluded to is grounded upon a supposition that there has been some irregularity in the prior proceedings, which the defendant has not done any act to preclude himself from taking advantage of. But if he have afterwards waved the irregularity, then the rule no longer attaches upon him. Now it is the universal practice of the Court that where there has been an irregularity, if the party overlook it and take subsequent steps in the cause, he cannot afterwards revert back to the irregularity and object to it. Justice requires that that rule should be general in its operation, having in view the advancement of right. And however inclined we may be to favour persons in the situation of the defendant, yet we must not go the length of breaking in upon the general practice of the Court.

Per Curiam,

Rule discharged (a).

(a) In *Walter v. Stewart*, 3 Wils. 455. The Court held that no advantage should be taken by a prisoner of an irregularity in not declaring against him in time, by reason of an impending treaty between him and the plaintiff for an accommodation.

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The KING *against* The Corporation of BEDFORD.Saturday,
Nov. 22d.

WILSON moved on a former day for a Mandamus directed to the recorder, deputy recorder, aldermen, bailiffs and commonalty of *Bedford* to proceed to the election of a mayor, the office being vacant. The affidavit on which the motion was grounded set forth the constitution of the borough which was a borough by prescription, consisting of a mayor, recorder, &c. and that by the usage the mayor is annually elected on the first *Monday* in *September*, and is sworn in and enters upon his office on the *Michaelmas-day* following. That on the first of those days *Francis Green* a burghers of the borough was duly nominated and elected into the office of mayor agreeable to the custom for the year ensuing, and notice was given to him to attend and be sworn in on the *Michaelmas-day* following; but that he did not attend, and refuses to take upon him the office.

If it appear with sufficient certainty to the Court that a person has been elected mayor of a borough on the day appointed by the usage, who is not qualified to accept the office, by reason of his not having previously taken the sacrament within the time limited by law, they will grant a Mandamus to the electors to proceed to a new election under the st. 13 Geo. 3. c. 4. s. 2. as if no election had in fact been made.

It was suggested (a) at the time of the motion made that *Green's* reason for such refusal was, because he had not taken the sacrament within one year previous to his election as required by the st. 13 Car. 2. s. 2. c. 1. s. 12. and therefore would not subject himself to the penalties imposed by law on persons taking upon themselves such offices without that qualification. And it was contended that as the statute declared the election void under those circumstances, the Court would consider the case the same as if the borough had omitted altogether to make any

(a) But this did not appear upon the affidavit at this time.

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election on the proper day, in which case the only remedy was by application to this Court for a Mandamus to them to proceed to an election, under the st. 11 Geo. 1. c. 4. s. 2. (a). and that they were desirous in the present instance to have such Mandamus rather than be at the expense of litigating the question with *Green*. It was added that writs of Mandamus had issued under similar circumstances to the corporations of *Liverpool*, *Thetford*, and other places.

The Court however expressed great doubt whether they could with propriety grant the writ under the circumstances disclosed by the affidavit in this case. For all that appeared was that *Green* had been duly elected according to the usage of the borough, in which case the office of mayor was already full, and there could be no other mayor legally elected. That supposing the election to have been properly made, the refusal of *Green* to take upon him the office availed nothing against the validity of his appointment, but he was indictable for such refusal. Under such circumstances it would be nugatory to grant a Mandamus to proceed to that which would be a void election; and it would involve the borough in difficulties, since all acts done under the new mayor would be void. The Court therefore thought it better in the first instance to grant a rule calling on *Green* and the late mayor of the borough of *Bedford* to shew cause why a writ of Mandamus should not issue to them commanding the said late mayor to swear *Green* into the office of mayor of the said borough, and commanding *Green* to appear before

(a) Vide *Rex v The Mayor, &c. of Cambridge*, where the Mandamus was granted after an election, it being colourable and void. 4 Burr. 2008.

the said late mayor and take the oaths, &c. and thereupon to take upon himself the office of mayor of the said borough for the remainder of the present year." Such a rule was accordingly granted; and on this day

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Gibbs on behalf of *Green* shewed for cause the reason above suggested, namely his incapacity to take upon himself the office by reason of his not having before duly qualified himself by taking the sacrament, in which case the stat. of *Car. 2.* avoids the election. And

The Court deeming this a sufficient answer,

Wilson again renewed his first application for a Mandamus to the members above named of the borough to proceed to an election of mayor; which was now

Granted accordingly.

JONES against PRICE.

Saturday,
Nov. 22d.

A RULE was obtained calling on the plaintiff to shew cause why an exoneratur should not be entered on the bail-piece, and the plaintiff pay the costs of putting in special bail and of this application. This was grounded on an objection to the affidavit to hold to bail, which had omitted to negative a tender of the debt in bank notes by the defendant, pursuant to the requisition of the stat. 37 *Geo. 3. c. 45. s. 9.*

No objection can be made to the insufficiency of an affidavit to hold to bail in not negating a tender of the debt in bank notes, after the bail have justified.

Abbott shewed for cause, that the defendant had voluntarily put in special bail at the return of the writ, justified the bail, although they were not excepted to; and drawn

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up the rule for the allowance and served it on the plaintiff; within a week after which he had applied for the present rule. This he contended was a waiver of any informality in the process, and cited *Chapman v. Snow*, 1 *Bef. & Pull.* 132. as in point.

Lawes, in support of the rule, said this was an application on behalf of the bail, who were obliged to justify before they could be heard; and they had taken the objection in reasonable time afterwards.

LORD KENYON C. J. This is a clear waiver of the objection, and did not want the authority of a precedent; that however cited is in point. Application should have been made in the first instance before the bail had justified: instead of which the defendant has lain by and suffered the plaintiff to incur additional expence on a supposition that all the proceedings were right, and now comes to complain: but he has adopted the process, and shall not now take advantage of any defect in it (a).

Per Curiam,

Rule discharged with costs.

(a) In *Norton v. Danvers*, 7 *Term Rep.* 375. the defendant's voluntarily giving a bail bond before an actual arrest was deemed a waiver of the objection to the affidavit to hold to bail. So in *Deffborough v. Coppinger*, 8 *Term Rep.* 77. The Court held that the objection should be made in a reasonable time after the error committed, and that it was too late to take it after judgment by default and notice of a writ of inquiry.

1800.

The KING *against* The Inhabitants of ILMINSTER.Saturday,
Nov. 22d.

TWO justices by an order removed *Joseph Grigg*, and his wife and children, by name, from *Honiton* in the county of *Devon* to *Ilminster* in the county of *Somerset*. The Sessions on appeal confirmed the order subject to the opinion of this Court on the following amended (a) case: nor is a public annual office, and that the pauper served it for a year; held that thereby gained in *L*.

The sessions finding that the pauper was legally appointed governor of the workhouse in *L*. at an annual salary, and that the office of governor a settlement was

The

(a) In the first case sent up to this Court it was stated "that the pauper was appointed in 1779 governor of the workhouse in the parish of *Ilminster* for the management and government of the poor therein, under the annual salary of 20*l*., which office he continued to serve for five years, and regularly received his salary during that period, when he was dismissed. That at the time of his appointment he was put by the parish officers into possession of certain apartments in the workhouse, appointed for that purpose, and which had been occupied by the former governor." This case being considered by the Court as defectively stated was sent back to the sessions to be restated; and they returned the same case again with this addition "That at the time of his appointment the pauper was put by the parish officers (*in conjunction with two of the principal people of the town who acted as inspectors of the accounts and conduct of the overseers*) into possession" &c. (as before).

Upon the first occasion, in *M. 40 Geo. 3*.

Ezß, in support of the order of sessions, contended that this was such an office or charge within the meaning of the st. 3 *W. 3. c. 11. s. 6.* as would enable the pauper to gain a settlement by having served it for a year. The principle on which a settlement is gained by serving an annual office in the parish is the notoriety to the parish of the residence of the party, *R x v. Bicham, 1 Stra. 411.* and no employment can be more notorious in its nature than this, to which the pauper was appointed by the parish itself. The only questions then are whether this employment be in its nature a public office, and whether the pauper served it in his own right, or merely as a deputy for others. The origin of this appointment is derived from the st. 9 *Geo. 1. c. 7. s. 4.*, whereby it is enacted, "that for the greater ease of parishes in the relief of the poor, it shall be lawful for the churchwardens and overseers with the consent of the major part of the parishioners or inhabitants in vestry or other parish or public meeting for that purpose assembled, or so many as shall be so assembled

1800.

The KING
against
The Inhabitants
of LILMINSTER.

The pauper was legally appointed in the year 1779 governor of the workhouse in the parish of *Ilminster*, at an annual

on usual notice given, to purchase or hire any house or houses in the same parish &c., and to contract with any person for the lodging, keeping, maintaining and employing all such poor &c. (i. e. whose names are registered in a book) and there to keep maintain and employ all such poor persons, and take the benefit of their work labour and service." Now here it is stated that the pauper was appointed to the management and government of the poor in the workhouse, which could not have been legally done by virtue of any other authority than what is conferred by this act; and therefore the Court will rather presume that he was so legally appointed, than that the parish officers took upon themselves * without any authority to delegate part of their trust to him. It is also stated that the pauper was appointed to this trust under an *annual salary*, which the parish officers could not take upon them to grant, and which could only be legally attributed to the exercise of the power conferred by the act. Then the salary being annual, the appointment must be taken to be of equal duration; and being so made, it was not in the power even of the parish at large, much less of the parish officers alone, to have dismissed the pauper before the end of the year, except perhaps for mispractice or abuse of trust. The *1. Geo. 1.* was the first general act for the erecting of workhouses; though some few were erected before by local acts of parliament †. The intention of the legislature was to create a new public officer with new powers, which in one respect exceeded that of overseers of the poor; for the person contracted with for the management and government of the poor may also engage to take the benefit of their labour in the workhouse, though in this instance the contract did not extend so far. The very nature of such an appointment imports a public office, being analogous to the duties of an overseer of the poor. In the case of *R. v. Dickson* before mentioned, the appointment of a collector of the duties on births and burials imposed by the stat. 6 & 7 W. 3. c. 6 holden under the commissioners for managing such duties, was deemed a public annual office, by serving which a settlement might be gained. But the legislature themselves have considered this trust as a public office; for in another statute passed in pari materia, though subsequent to the appointment of the pauper, the stat. 22 Geo. 3. c. 83. reciting the former act, and that for want of proper regulations

* On the first amended case the concurrence of two of the principal payers, who acted by delegation for the rest under the name of *inspectors*, was stated.

† The 13 & 14 Car. 2. c. 12. s. 4. &c. was confined to *London and W^{est}minster* and parishes within the bills of mortality. It was further enforced by *11. 23 Car. 2. c. 18.*

annual salary of 20*l.*, which office he continued to serve for five years, and regularly received his salary during that period. The said office of governor is a public, annual office; and the Sessions were of opinion that he gained a settlement in *Ilminster*. When this case was called on

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The KING
against
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of ILMINSTER.

The Court said that the facts now stated precluded any further discussion; for the Sessions had found that the pauper had served a public annual office in the parish, to which he was legally appointed.

Per Curiam, Order of Sessions confirmed.

Clapp and *East* were to have argued in support of the order; but no counsel appeared for the appellants.

tions and due control over the persons engaged in such contracts, the act had not had the desired effect; an option is given to adopt another form of appointment, with greater control over the appointee; and the statute proceeds to call him an officer (naming him governor of the workhouse) and the appointment *an office* (l. 14. and schedule No. 7.) although with less power than under the former act; and by this latter act such governor of the workhouse "shall have the care management and employment of the poor to be sent thither, and be allowed a salary or wages for his trouble." This serves to explain the intention of the legislature in the former act, if there were any doubt of it upon the face of the act itself. Now it appears that the trust committed to the pauper was exactly of the same description as that conferred by the last statute, and by the same name; and such an appointment is therein expressly denominated *an office*. Then the pauper having served such an office for above a year in *Ilminster* gained a settlement in that parish.

Leas Serjt. *Hath*, and *Lyon* were to have argued on the other side.

The Court however thought the facts were not sufficiently stated to raise the question; mere evidence being stated, and not the facts by whom and in what manner and under what authority the appointment of the pauper was made, and Lord *Kenyon* C. J. after the case had been amended the first time intimated a strong opinion that as the facts then appeared, no settlement could be gained; considering the appointment of the pauper merely in the nature of a servant to the parish officers, by whom he might have been dismissed at any time within the year.

1800.

Monday,
Nov. 24th.CLARKE *against* BRADSHAW.

In scire facias on the recognizance of bail and scire feci returned, it is sufficient to fix the bail if they were summoned before the rising of the Court on the return day. But the Court will stay proceedings against both the bail, on payment of the sum sworn to and costs, altho' less than the damages recovered, or than the sum named in the process.

A RULE was obtained calling on the plaintiff to shew cause why the proceedings on the scire facias against the bail in this cause should not be set aside for irregularity; the question being whether the bail had been summoned in time. The plaintiff, having obtained judgment in Trinity term last against the principal, sued out a *capias ad satisfaciendum* returnable the last return of that term, on which *non est inventus* was returned. On the 29th of *October* a scire facias issued on the recognizance of the bail returnable the 6th of *November*; and on the 31st of *October* the writ was left in the office, and a warrant obtained thereon of the same date; but the bail were not summoned, till between seven and eight o'clock in the evening of the 5th of *November*, the day before the return of the writ; and they did not render their principal till the 10th of *November*.

Erskine, *Garrou*, and *Marryat*, shewed cause, and contended that the proceedings were regular. A plaintiff has two methods of proceeding against the bail after a *capias ad satisfaciendum* issued against the principal and *non est inventus* returned; either by issuing two writs of scire facias and two *nihilis* being returned thereon, or by issuing one scire facias, which must lie four days exclusive in the office before the return, and a summons thereon being served on the bail, and scire feci returned. But the service of such summons is a mere matter of form, and if it be done at any time before the rising of the Court on the return day of the writ, it is sufficient. Such a sum-

mons

mous may indeed seem to be nugatory for the purpose of giving notice to the bail to surrender their principal, but matters of practice are of positive regulation, and there is at least as much advantage to the bail in this method of proceeding as in the other, by two *scire facias*' and two *nihils* returned. The true reason of the practice in either case is stated in *Hunt v. Cox* (a) to be this, that the suing out of the *capias ad satisfaciendum* is the real notice to the bail that the plaintiff looks to the body of the principal as his security, and the bail are bound to search the office to know when it issued and is returnable, in order that they may have his body ready to render at the return of the writ.

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CLARKE
against
BRADSHAW;

Gibbs, Perceval, and Espinasse, contra. The mode of proceeding adopted in this case is full as disadvantageous to the bail as that by two *scire facias*' and two *nihils* returned, although it professes to be more fair and reasonable; and the objection is that that has not been done, which the practice professes to require, namely to give the bail notice, (by which must be understood reasonable notice,) to render the principal. According to the practice contended for the summons may be rendered altogether nugatory by being withheld till the last moment of the sitting of the Court on the return day: but if that were so the practice itself would never have existed, as it could only tend to incur a fruitless expence and loss of time. Besides, the contrary was ruled in *Webb v. Harvey* (b), where the Court set aside proceedings in *scire facias* against the bail upon *scire feci* returned, because it appeared that they were only summoned an hour before the rising of the Court on the return day; considering that the summons

(a) 3 *Burr.* 1360.(b) 2 *Term R.p.* 757

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against
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was intended to afford them a reasonable warning to take their principal and render him before the return of the writ. This is also consonant to what was ruled in *Wright v. Page* (a). Now here it appears that the summons was fraudulently kept back for several days after the writ was in the office; and only served the evening before the return day, which could only be done for the purpose of preventing the bail from availing themselves of the notice to render the principal in time.

LORD KENYON C. J. There was certainly a mistake in the report of the case of *Webb v. Harvey*, in stating that the notice to the bail was before the rising of the Court on the return day. On application afterwards by Mr. Impey to the Master for information on the point, he revised the affidavits (b) on which the rule was pronounced, and found that the summons was not served on the bail till half past three o'clock on the return day, which was after the rising of the Court; on which he corrected his note; and the practice stands accurately stated in the last edition of Mr. Impey's book on the subject. And I find it is considered as the settled practice of the Court that if the bail be summoned any time before the rising of the Court on the return day of the writ it is sufficient. Such being the case it is unnecessary to inquire into the reason of the thing; yet if it were traced to its source perhaps it might not appear so absurd as is supposed. Bail are in law con-

(a) 2 Black. R. 837.

(b) Having since referred to the original affidavits filed, I find that they were contradictory upon this point, which may account in part for the error; but the affidavit on the part of the bail on which the rule was obtained was as his Lordship stated it to be, on which it is probable that the Court decided; thinking that it had not been distinctly answered by the affidavit of the plaintiff, from whence the fact as stated in the report was taken.

sidered as the gaolers of the principal, and to have him always in their custody; they undertake that he shall be forthcoming when called upon: this is properly at the return of the capias. Whatever time they are allowed afterwards to render him is by the indulgent practice of the Court: this is either upon two writs of scire facias returned nihil upon each, or upon one scire facias and a summons and a return of scire feci after the writ has lain a certain time in the office. The bail are bound to watch these proceedings, and to have their principal ready to render at the plaintiff's call. Indeed unless they live in *Middlesex* how can the sheriff serve the bail with notice. It is sufficient however to say that the practice as I have stated it was long ago settled, as appears by a case in *'Strange (a)*. And I profess to found my judgment on the settled practice and not on any reasoning of my own.

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LAWRENCE J. (b). The case in *Strange* settled the practice which has been continued ever since. There must have been a misapprehension of the opinion of the Court in the case of *Webb v. Harvey*: and that appears by referring to the case of *Pool v. Wills* there cited, on the authority of which the rule was made absolute for setting aside the proceedings against the bail: in which latter it is stated that the bail were not summoned till *after* the rising of the Court on the return day; which could not

(a) *Olbian v. Frazier*, M. 12 Geo. 1. 1 Stra. 644. The Reporter refers to a subsequent case of *Bland v. Perry*, T. 4 Geo. 2. where the same point was ruled again on great debate. And in *Williams v. Musson*, M. 4 Geo. 2. it was settled that the scire facias must lie four days in the office, as well where scire feci is returned, as nihil.

(b) This part of the case was determined on Monday the 17th of November. Mr. Justice Lawrence was absent when the case was brought on again upon another rule.

have

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 CLARKE
 against
 BRADSHAW.

have been any authority for the decision in the principal case if the bail there had been summoned *before*. Besides, it is apparent if we advert to the reason of the thing, that the time of serving the bail with notice cannot be material, provided it be done before the rising of the Court on the return day. The summons is the act of the sheriff, and the service of it on the bail is in order to warrant his return to the Court of scire feci. The sheriff may indeed submit to receive the directions of the party as to the time for serving it; but still it is the act, not of the party, but of the sheriff through the medium of his officer. All these proceedings are in truth matter of indulgence to the bail. It is indulgence to them to permit them to render the principal after the return of the *capias ad satisfaciendum* against him; and therefore they cannot complain that they are not allowed still greater indulgence.

Per Curiam,

Rule discharged.

Gibbs then obtained a rule to shew cause why the proceedings against the bail should not be stayed, upon payment of the debt sworn to and the costs to be taxed by the Master.

Erskine, Garrow, and Marryatt, now shewed cause. They stated that the action was by bill and the *ac etiam* for 4000 *l.*: that the sum sworn to for which the defendant was holden to bail was only 1900 *l.* 10 *s.*, but the sum recovered was 2549 *l.* 10 *s.*: and they contended, 1st, that the bail were liable to the extent of the sum recovered, being within the amount of the sum named in the process. *Martin v. Moor*, 2 *Str.* 922. or if not, 2dly, that each of the bail were separately liable to the extent of the sum sworn to; and therefore both together were liable to an amount which would

would cover the damages recovered and costs. - *Dabl v. Johnson* in C. B. 1 *Bof. & Pull.* 205. vide *Calvera & ux. v. De Miranda, Barnes*, 2d edit. 76. S. P.

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LE BLANC J. observed that in C. B. the bail enter into a recognizance for double the amount of the sum sworn to.

The Court on consideration of the rule of Court, *E. 5 Geo. 2.* (a) and of the case of *Jackson v. Haffel* (b), and of another case, furnished by the Master, of *Tranel v. Rivaz* and another, *Tr. 16 Geo. 3.* (c) (which Lord *Kenyon* read from the Master's note) said that it was absolutely of course to grant the application. That the bail to the action were altogether only liable to the amount of the sum sworn to and costs; though as between them and the plaintiff that sum might be levied upon either of them. But the plaintiff could not recover it twice over from the bail, by taxing each separately to that amount.

Rule absolute (d).

(a) Rules and Orders of K. B. 10.*

(b) *Doug.* 330

(c) *Tranel v. Rivaz* and another, *Tr. 16 G. 3. B. R.* "In an action on the recognizance of bail leave was given to stay proceedings on payment of the sum sworn to, viz. 200 *l.* the costs in the original action, and the costs against the bail, and of the application; although on cause shewn it appeared that the defendant was gone abroad, and that the plaintiff had recovered 500 *l.*"

(d) The distinction is between bail to the action and bail to the sheriff; the latter are liable to the whole debt (without regard to the sum sworn to) and costs, provided the amount does not exceed the penalty of the bail-bond. *Stevenson v. Cameron*, 8 *Term Rep.* 28. *Orton v. Vincent, Coop.* 71. So in C. B. *Mitchell v. Gibbons*, 1 *H. Blac.* 76. So the sheriff is liable to the whole amount if he discharge the defendant without taking a bail-bond, *Stevenson v. Cameron* supra: or generally, upon an attachment against him for not bringing in the body. *Fowlds v. Mackintosh*, 1 *H. Blac.* 233. *Heppel v. King*, 7 *Term. Rep.* 370.

* The reason of making this rule which is particularly worded may be gathered from the case of *Genballo v. Cognoni*, *M. 3 Ann. Salk.* 102. where Lord *Holt* held that if the sum recovered exceeded the sum in the ac enam the bail were not liable at all, because their recognizance was to answer the condemnation, which in that case could not be,

1800.

Monday,
Nov. 24th.PARR *against* ELIASON and Others.

A bill of exchange payable to *A.* or order, which was legal in its inception, was by him indorsed to *B.* for an usurious consideration, who passed it to a third person for a valuable consideration, without notice of the usury, by whom it was paid to *B.*'s assignees after his bankruptcy, in satisfaction of a debt owing to the bankrupts' estate: held that the indorsement of *A.* to *B.* on an usurious account did not avoid the bill in the hands of an innocent holder by virtue of the stat. of usury; and that *B.*'s assignees being clothed with the rights of such innocent indorsee were entitled to hold the bill against *A.*, tho' as between *A.* and *B.* the security was void. An agreement on discounting a bill that the party should take in part payment another bill which had time to run as cash, altho' the full discount was taken, is usurious.

IN trover for a bill of exchange, it appeared that the plaintiff, residing at *Liverpool*, in 1799 became possessed of the bill in question, which was drawn by a correspondent in the *West Indies* upon a house in *London* in favour of the plaintiff or his order, and accepted payable on the 27th of *July* 1800. The plaintiff having occasion to raise money applied to the house of *Perfent* and *Bodeker* on the 18th of *June* 1799 to discount the bill, which they agreed to do and took the full discount; stipulating however that the plaintiff should in part payment of the money take their acceptance of a bill to be drawn by him on them, at three months date, which was done accordingly; and at the same time the plaintiff indorsed the original bill in question to them. *Perfent* and *Bodeker* became bankrupts in *September* 1799, having first negotiated the bill; and the same was afterwards paid to the defendants, as assignees under their commission, in satisfaction of a debt due to the bankrupts' estate. It also appeared that after the bankruptcy the plaintiff was obliged to take up and pay the bill drawn by him upon the bankrupts and accepted by them. At the trial before Lord *Kenyon* at *Guildhall*, it was contended on the part of the plaintiff, that the indorsement of the bill by him to the bankrupts for an usurious consideration avoided the security by the stat. 12 *Ann.* *st.* 2. *c.* 16. whereby all bonds and assurances for "payment of any money to be lent upon usury &c. shall be void;" which has been holden to avoid securities of this kind even in the hands of innocent indorseees for a valuable consideration without notice. *Love v. Waller* (a), and *Bowyer v.*

(a) *Dougl.* 736.

Bampton (a). But Lord *Kenyon* was of opinion that the assignees of the bankrupt had a right to protect their possession of the bill by the title of the party from whom they received it in payment, who was an innocent holder; and that the bill being valid in its inception the statute of usury did not apply to the present case: and thereupon the plaintiff was nonsuited. A rule having been obtained on a former day in this term, calling on the defendants to shew cause why the nonsuit should not be set aside and a new trial had,

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PARR
against
ELIASON.

Law, and *Wood*, were now called upon to support the rule. It is clear that the consideration for indorsing the bill, as between the plaintiff and the bankrupts, was usurious; and if it had come to the hands of the assignees immediately from the bankrupts their title must have been affected by the usury. But though the defendants may be considered as standing in the situation of innocent holders, yet the instrument itself is avoided by the statute of usury, and no title could be conveyed by the plaintiff's indorsement. The bill being originally made payable to the plaintiff or his order, without his indorsement it was not negotiable, nor was any assurance in law to any other person: then the usurious consideration was co-temporaneous with the first existence of the instrument as an assurance to the bankrupts. Suppose the bill had been drawn by the plaintiff himself payable to his own order, and he had agreed to indorse it for an usurious consideration, it cannot be pretended but that it would have been void by the statute: this then is the same in effect; for every indorsement is as it were a new drawing of the bill (b): and the

(a) 2 *Str.* 1155. upon the Gaming Act. 9 *Ann.* c. 14.

(b) *Vide* 2 *Burr.* 674.

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 PARR
 against
 ELIASON.

assignees, though innocent holders, must in any action upon the bill derive title through the first indorser. If the bankrupts could not have maintained an action against the plaintiff upon his indorsement on account of its being an assurance for an usurious consideration, neither could any subsequent holder, according to the construction put upon the statute. Then it is inconsistent to say that though no action could be maintained against the first indorser, yet that title may be made through him to another.

Erskine, Gibbs, and Taddy, contra, were stopped by the Court.

Lord KENYON C. J. There is nothing in the point: and it might be attended with serious consequences if it could be supposed that the Court entertained any doubt upon it. The commerce of this country subsists upon paper credit; but if this action could be maintained no man would be safe in taking even a bank of *England* post bill payable to order; for however just and legal it might be in its inception, if the payee passed it to another for an usurious consideration it is now contended that it would be void in the hands of any subsequent innocent holder, and might be recovered from him. Where the bill itself in its original formation is given for an usurious consideration the words of the statute of *Anne* are peremptory that the assurance shall be void; and the construction which has been put upon the statute has gone far enough in saying that it shall be avoided even in the hands of an innocent indorsee without notice. But no case has gone the length now contended for, nor do the words of the statute require it. Here the bill was fair and legal in its construction.

coction, and therefore no advantage can be taken of what happened afterwards against bonâ fide holders. The defendants stand clothed with the rights of the party from whom they received the bill in payment, and must therefore be taken to be holders for a valuable consideration without notice. I referred at the trial to a case in *Siderfin* (a), which is a very leading authority, wherein it is said, that though a conveyance may in its creation be fraudulent and voidable as against a purchaser, yet it may become valid by matter ex post facto: and that a person to whom a conveyance was made which was voluntary in its creation, and therefore voidable, might be protected by the title of a subsequent purchaser for a valuable consideration who had acquired an interest in it.

Per Curiam,

Rule discharged (b).

(a) *Prodgers v. Langham*, 1 Sid. 133. See also *Lowther v. Carleton*, Cas. in Eq. temp. Ld. Talbot 187. where a purchaser for a valuable consideration, but with notice, protected himself by making title through a third person whose title could not be impeached by notice of the prior defect. And several cases in 2 Vern. 159. where purchasers for valuable consideration without notice have protected themselves by getting a legal title, though obtained originally by undue means.

(b) Vide *Ferrall v. Shuen*, 1 Saund. 294. that a bond which was good when made is not avoided by a subsequent usurious contract for delaying the day of payment of it. And vi. n. 1. by Serjt. *Williams*, where all the cases are very ably collected; and *Cutbbert v. Haley*, 8 Term Rep. 390.

1800.

PARR
against
ELLIASON.

1800.

Monday,
Nov. 24th.

The premium paid on an illegal insurance to cover a trading with an enemy cannot be recovered back, tho' the underwriter cannot be compelled to make good the loss.

VANDYCK and Others *against* HEWITT.

THE plaintiff declared upon a policy of insurance on goods at and from *London* to *Emden* or *Amsterdam*, at a premium of ten guineas per cent. to return five upon their arrival at the place of destination; with an averment that the insurance was made for the benefit of certain persons therein named; and then declared as upon a loss by capture in the course of the voyage insured. The declaration also contained counts for money paid and for money had and received.

The goods were shipped on board a *Prussian* neutral vessel, on account, partly of the plaintiffs who were naturalized foreigners resident in *London*, and partly of certain other persons, aliens, then resident in *Holland*. At the trial at *Guildhall* the insurance itself was abandoned on the ground of its being intended to cover a trading with an enemy's country, *Holland* being at the time of such insurance in a state of hostility with this kingdom; and therefore falling within the decision of the case of *Potts v. Bell* (a); but it was contended that the plaintiffs were entitled to recover back the premium, because the policy never attached, and consequently the defendant's risk never commenced. Lord *Kenyon* permitted a verdict to be taken for the plaintiff for that amount, with liberty to the defendant's counsel to move to set that aside and to enter a verdict for the defendant. A rule nisi was accordingly obtained on a former day in this term for that purpose; against which

Erskine, Park, and J. Warren, now shewed cause. Here was no fraud intended, as in the case of smuggling

transactions. The assured are neutral foreigners, who have paid money to the defendant for a certain consideration the benefit of which they are precluded from receiving by a rule of public policy: it is but just therefore that as the insurance never attached, and the underwriter has not incurred any risk, he should not be suffered to retain the consideration (a). Admitting the contract to be illegal, yet according to *Lacaufrage v. White* (b) the party who has deposited money upon an illegal consideration, (as in that case upon an illegal wager) may recover it back again even after the event is determined against him. They also referred to the case of *Nesbitt v. Whitmore* in Easter term last, where this point was agitated, and where finally the premium was returned (c).

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against
HEWITT

Law and *Garrow* contra were stopped by the Court.

LORD KENYON C. J. There is no distinguishing this on principle from the common case of a smuggling transaction. Where the vendor assists the vendee in running the goods to evade the laws of the country he cannot re-

(a) *Tyrie v. Fletcher, Corp.* 668.

(b) 7 *Term Rep.* 535.

(c) In that case, under similar circumstances with the present, *Giles* for the plaintiff admitted that he could not recover the loss upon the policy since the determination in *Bell v. Potts*: but he contended that the plaintiff was entitled to take a verdict for the premium, which had not been paid into Court. This was resisted by *Park* for the defendant, on the ground that no such question had been reserved at the trial. *Et per Curiam.* That point not having been made, and the jury not having assessed any such damages, but only the amount of the loss to be recovered, supposing the plaintiff to be entitled to it in point of law, we cannot now interpose any other sum in lieu of their verdict. Whereupon *Giles* prayed leave to amend the verdict by the Judge's notes. The Court with much reluctance, and with a view to a compromise, granted a rule to shew cause. And afterwards it was agreed between the parties that the premium should be repaid, without costs on either side.

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VANDYCK
against
HEWITT.

cover back the goods themselves or the value of them (a). The rule has been settled at all times, that where both parties are in pari delicto, which is the case here, potior est conditio possidentis.

LE BLANC J. The ground of the determination in *Lacauffade v. White* has been since very much canvassed in a later case of *Hogben v. Hancock* (b), where it was considered that money deposited upon an illegal wager, and paid over to the winner, could not be recovered back from him.

Per Curiam, Rule absolute for the verdict to be entered for the defendant (c).

(a) Vide *Clagar v. Penland*, 4 Term Rep. 466. and *Waymill v. Rids*, 5 vol. 599.

(b) 8 Term Rep. 575.

(c) So in *Loroy v. Bourdieu*, Dougl. 463. the Court held that the assured could not recover back the premium paid upon a gaming policy without interest, which is illegal within the fiat. 19 Geo. 2. c. 37.

Tuesday,
Nov. 25th.

JOHNSON and Another against COLLINGS.

A mere promise by a debtor to his creditor, that if he would draw a bill upon him at a certain date for the amount of his demand he should then have the money and would pay it, does not amount in law to an acceptance of the bill when drawn; and an indorsee for a valuable consideration, between whom and the drawee no communication passed at the time of his taking the bill, can neither recover upon the count as for an acceptance, nor on the general counts as for money had and received &c.

THE plaintiffs declared in the first count against the defendant as the acceptor of a bill of exchange drawn by one *Ruff*, dated the 25th of October 1799, and directed to the defendant, whereby he was required two months after date to pay to the order of the drawer 23 l. 10 s. 6 d. value received, which bill was afterwards indorsed by *Ruff* to one *Jane Ruff*, and by her to the plaintiffs. There were other general counts for money had and received, money paid, and upon an account stated. To which there was a plea of the general issue.

At

At the trial before *Le Blanc J.* at the last *Worcester* assizes it appeared in evidence that *Ruff*, having furnished goods to the defendant to the amount of the bill, applied to him for payment, when the defendant excused himself at that time, but said that if *Ruff* would draw on him a bill at two months from the 25th of *October* for the amount he should then have money and would pay it. *Ruff* afterwards drew the bill in question, dated 25th of *October* at two months, but it never was in fact presented to the defendant for his acceptance; nor did he ever in fact accept it, otherwise than as is stated above. It was said at the trial to be the practice at *Bristol*, where the defendant lived, not to accept bills or to have them presented for acceptance. *Ruff*, to whose own order it was made payable, having indorsed the bill, afterwards passed it to the plaintiffs in discharge of an old debt: but no communication took place at the time between the plaintiffs and the defendant. After this and before the bill became due *Ruff* became a bankrupt; and when the bill was due the plaintiffs presented it to the defendant for payment, who then declined it on account of *Ruff*'s bankruptcy without an indemnity, admitting however that he owed the money either to *Ruff* or to *Ruff*'s assignees. The learned Judge was of opinion that a mere promise, such as this, to accept a bill when it should be drawn, at least unless made to a third person, or accompanied at least with circumstances which might induce a third person to take the bill, (which was not the case here,) did not amount to an acceptance, and therefore the plaintiffs were not entitled to recover on the first count. And that as there had been no communication between these parties at the time, nor any consideration having passed as between them, there was no evidence to warrant a finding for the plaintiffs on either

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of the money counts: whereupon he directed a nonsuit to be entered, with liberty to the plaintiffs to move to set it aside and enter a verdict for the amount of their demand, if the Court should be opinion that they were entitled to recover on either of the counts. A rule nisi was accordingly obtained for this purpose on a former day.

Williams Serjt., who was now to have shewn cause, was flopped by the Court.

Wigley and *Clifford* in support of the rule. 1st. A promise to accept a bill when drawn amounts in law to an acceptance. In *Pillans* and *Rose v. Van Mierop* and *Hopkins* (a) the plaintiffs having advanced money to one *White* upon the faith of a written assurance by letter from the defendants "that they would accept such bills as the plaintiffs should in a month's time draw upon them for 800 l. upon the credit of *White*," the Court after much deliberation held that whether it were an actual acceptance, or a loan to *White* upon the credit of the defendants, it would equally bind the latter. But Lord *Mansfield* there said (b), "This amounts to the same thing as an acceptance. *I will give the bill due honour* is in effect accepting it. If a man agree that he will do the formal part, the law looks upon it, in the case of an acceptance of a bill, as if actually done." *Wilmut* J. said (c), "An agreement to accept a bill to be drawn in future would, as it seems to me, by connexion and relation bind on account of the antecedent relation. And I see no difference between its being before or after the bill was drawn." *Yates* J. said (d), "This agreement to honour the bill was a virtual accept-

(a) 3 Burr. 1663.

(b) Ib. 1669.

(c) Ib. 1673.

(d) Ib. 1674.

ance of it." Again, "A promise to accept is the same as an actual acceptance." *Aston J.* said, "The defendants have undertaken to honour the plaintiffs draft, therefore they are bound to pay it." The same doctrine was admitted in *Mason v. Hunt* (a); but that was a conditional acceptance, and the condition was afterwards broken. In *Powell v. Monnier* (b) there was an assurance by letter that the bill should be accepted, which was holden sufficient to bind the drawee; but that was after the bill was drawn. 2dly, Supposing this not to amount in law to an acceptance, yet there is sufficient consideration to sustain a verdict for the plaintiffs on the money counts. The defendant owed *Ruff* this money; and his promise to honour the bill when drawn was an agreement to take as his creditor any person to whom *Ruff* should appoint the money to be paid. He then having by his indorsement appointed the money to be paid to the plaintiffs, it raises an assumpsit in law by the defendant to pay them so much. And the authority having been given by *Ruff* before his bankruptcy that event cannot vary the case. It was holden in *Fenner v. Mears* (c) that general indebitatus assumpsit would lie by the assignee of a respondentia bond against the obligor, who had before engaged by an indorsement on the bond to pay the same to any assignee: though it was agreed that no action could have been maintained on the bond itself by the assignee in his own name. It was there also admitted that if the obligor had paid the assignee, the former might have pleaded payment to an action on the bond brought by the obligee. And it was there con-

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(a) *Dugl.* 297.(b) 1 *Atk.* 611.

(c) 2 *Blac. Rep.* 1269. Vide also *Innes v. Dunlop*, 8 *Term Rep.* 595. where the assignment of a *Scotch* bond was deemed a good consideration to support an assumpsit here.

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considered that the agreement amounted to a particular promise to the assignee whenever any such should be. Lord C. J. *De Grey* said that the contract was devised to operate upon subsequent assignments, and amounted to a declaration that upon such assignment the money borrowed should no longer be the money of *A.* but of *B.* his substitute. So here the agreement to accept amounts to a particular promise to the holder of the bill to whom it is negotiated to pay him the amount: it is money had and received to his use. Thus in *Talbot v. Harris* (a) a bill was accepted by the defendant payable to the order of a fictitious person whose supposed indorsement was put upon it; so that being incapable of proof, no action could be maintained as upon the bill. But the Court held that a bona fide indorsee for a valuable consideration might recover against the acceptor upon an implied assumpsit for money paid and money had and received. Lord *Kenyon* in giving judgment said, "it was an appropriation of so much money to be paid to the person who should become the holder of the bill." Again, in *Israel v. Douglas* (b) *A.* being indebted to *B.* for brokerage, and *B.* to *C.* for money lent, *B.* gave an order to *A.* to pay *C.* the money due from *A.* to *B.*, which order *A.* having accepted, a majority of the Court held that *C.* might maintain an action against *A.* for money had and received. And *Gould J.* expressly likened it to the case of a man having money due to another in his hands, which that other orders him to pay to a third person: and that there was no substantial difference, whether one in fact pays money to another for a third person, or whether he gives the other an order to pay over so much money, to which he assents: that in reason and sound law it was money

(a) 3 Term Rep. 174.

(b) 1 H. Blac. 239.

had and received to the use of such third person. *Wilson J.* who differed on that point, yet agreed that the action was maintainable on the count for the insimul computassent. There is this further reason for holding the defendant liable, because his conduct was calculated to deceive third persons and put them off their guard: for if there had been no such promise to pay, the plaintiffs would have resorted to *Ruff* at once, and not have deferred their application till after the bankruptcy when it was too late. Besides there was a subsequent promise by the defendant to pay the bill to the plaintiffs if they would indemnify him against *Ruff's* assignees; and as the law will indemnify him that is the same thing.

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Lord KENYON C. J. This is a question of great moment. It is much to be lamented that any thing has been deemed to be an acceptance of a bill of exchange besides an express acceptance in writing: but I admit that the cases have gone beyond that line, and have determined that there may be a parol acceptance: that perhaps was going too far; but at any rate the determinations have gone no further; and I am not disposed to carry them to the length now contended for, and to say that a promise to accept a bill before it is drawn is equally binding as if made afterwards. It is not generally true that a promise to do a thing is the same thing in law as the actually doing it; it certainly is not so as applied to this case. This was a promise to accept a non-existing bill, which varies this case from all those which have been decided upon the same subject; and I know not by what law I can say that such a promise is binding as an acceptance. The consequence is that the plaintiffs cannot recover upon the count as upon an acceptance of a bill of exchange. As to the other

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ground, if we were to suffer the plaintiffs to recover on the general counts, we must say that a chose in action is assignable (a), a doctrine to which I will never subscribe. I cannot as at present advised and upon the general view of it agree with the case of *Fenner v. Mears* in *Blac. Rep.* The result of it however seems to be this, that the determination having been made according to equity and good conscience, the Court would not disturb the verdict; and I doubt whether the decision can be sustained on any other ground. The undertaking there indeed was in writing; but I am not prepared to say that that makes any difference: though a distinction of that kind was much dwelt upon in another case as supplying a want of consideration (b): but that has never been adopted since, and was afterwards expressly over-ruled in the case of *Rain v. Hughes* in the House of Lords (c). However no question of that sort can arise here; and I am clearly satisfied that there is no evidence to support the promises laid in any of the counts.

GROSE J. It would be of most dangerous consequence to relax the rule of law to the extent here contended for. By the general rule a chose in action is not assignable, except by the custom of merchants. The assignment of a chose in action by a bill of exchange is founded on that law, and cannot be carried further than that will warrant it; and no authority has been cited to shew that by the law, merchant a mere promise to accept a bill to be drawn in future amounts to an actual acceptance of the bill when

(a) Vide *Forth v. Stanton*, 1 *Saund. Rep.* 210, 211. and n. 2. by Serjt. Williams.

(b) Vide the opinion of *Wilmot J.* delivered in *Pillans v. Van Meerope*, 3 *Burr.* 1670, 1.

(c) 7 *Term Rep.* 350. n.

drawn :

drawn. Then we have no authority to extend the rules which have been hitherto established. As to the general counts, if we were to permit the plaintiffs to recover on this evidence, it would be making all choses in action assignable, which cannot be contended for, and would throw the whole system into confusion.

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LE BLANC J. In the case of *Pierfon v. Dunlop (a)*, Lord *Mansfield* limited and truly limited the doctrine which had been before laid down in *Pillaus v. Van Mierop*. He there says "It has been truly said as a general rule that the mere answer of a merchant to the drawer of a bill, saying, *He will duly honour it*, is no acceptance; unless accompanied with circumstances which may induce a third person to take the bill by indorsement: but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer." Therefore he explains and limits his own rule which he had before delivered concerning such an acceptance, confining it to the case where credit is given by a third person upon the faith of such an assurance, on which he acts, and by which he is induced to take the bill.

Lord KENYON C. J. added, that he thought that the admitting a promise to accept before the existence of the bill to operate as an actual acceptance of it afterwards, even with the qualification last mentioned, was carrying the doctrine of implied acceptances to the utmost verge of the law; and he doubted whether it did not even go

(a) *Cutp.* 573.

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beyond the proper boundary: though this case was not helped even by that opinion.

Rule discharged (a).

(a) In *Beaumes' Lex Merc.* 454. pl. 16. it is said, "If the possessor (i. e. of a bill of exchange) hath neglected to demand acceptance before the drawer's failure, and the person to whom it is directed has advice thereof, he cannot be compelled to accept the draught, though previous to the knowledge of the drawer's misfortunes *he had acquainted him with his intention to honour his bill, and even afterwards confesses that he should have done it had it been presented and the acceptance demanded before the advice of the drawer's failure had reached him.*" And again, p. 466. pl. 112. "He that verbally or by letter has promised to accept any bills drawn on him for a third person's account, and he to whom the promise was made *does in consequence thereof give the third person credit, relying on a punctual compliance; in this case he that has engaged his word is obliged to fulfil it or be answerable for all damages that shall proceed from a breach thereof &c.*

Wednesday,
Nov. 26th.

M^cMANUS against CRICKETT.

A master is not liable in trespass for the wilful act of his servant, as by driving his master's carriage against another, done without the direction or assent of the master. But he is liable to answer for any damage arising to another from the negligence or unskilfulness of his servant acting in his employ.

THIS case was very much discussed at the bar, upon a motion to set aside a verdict for the plaintiff and enter a nonsuit, by *Gibbs* and *Wood*, against the rule, and *Garraway* and *Giles* in support of it. The Court took time to consider of their judgment; and afterwards entered fully into the cases cited and the arguments urged at the bar, that it is unnecessary to detail them in the usual form.

LORD KENYON C^J. now delivered the unanimous opinion of the Court (a).

This is an action of trespass, in which the declaration charges that the defendant with force and arms drove a

(a) *Lawrence J.* was present in Court when the case was argued on a former day in the term.

certain

certain chariot against a chaise in which the plaintiff was riding in the king's highway, by which the plaintiff was thrown from his chaise and greatly hurt. At the trial it appeared in evidence that one *Brown*, a servant of the defendant, wilfully drove the chariot against the plaintiff's chaise, but that the defendant was not himself present (a), nor did he in any manner direct or assent to the act of the servant, and the question is, if for this wilful and designed act of the servant an action of trespass lies against the defendant his master? As this is a question of very general extent, and as cases were cited at the bar, where verdicts had been obtained against masters for the misconduct of their servants under similar circumstances, we were desirous of looking into the authorities on the subject before we gave our opinion; and after an examination of all that we could find as to this point, we think that this action cannot be maintained. It is a question of very general concern and has been often canvassed; but I hope at last it will be at rest. It is said in *Bro. Abr. tit. Trespass*, pl: 435. "If my servant contrary to my will chase my beasts into the soil of another I shall not be punished." And in 2 *Roll Abr.* 553. "If my servant without my notice put my beasts into another's land, my servant is the trespasser and not I; because by the voluntary putting of the beasts there without my assent, he gains a special property for the time, and so to this purpose they are his beasts." I have looked into the correspondent part in *Vin. Abr.* and as he has not produced any case contrary to this, I am satisfied with the authority of it. And in *Noy's Maxims*, ch. 44. "If I command my servant to distrain, and he ride on the distress, he shall be punished not I."

(a) No person was in the carriage: the act was done by the servant either in going for or after he had set down his master.

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And it is laid down by *Holt C. J.* in *Middleton v. Fowler*, *Salk.* 282. as a general position, “that no master is chargeable with the acts of his servant but when he acts in the execution of the authority given him.” Now when a servant quits sight of the object for which he is employed, and without having in view his master’s orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and according to the doctrine of Lord *Holt* his master will not be answerable for such act. Such upon the evidence was the present case: and the technical reason in 2 *Roll Abr.* with respect to the sheep applies here; and it may be said that the servant by wilfully driving the chariot against the plaintiff’s chaise without his master’s assent gained a special property for the time, and so to that purpose the chariot was the servant’s. This doctrine does not at all militate with the cases in which a master has been holden liable for the mischief arising from the negligence or unskilfulness of his servant who had no purpose but the execution of his master’s orders; but the form of those actions proves that this action of trespass cannot be maintained: for if it can be supported, it must be upon the ground that in trespass all are principals; but the form of those actions shews, that where the servant is in point of law a trespasser, the master is not chargeable as such; though liable to make a compensation for the damage consequential from his employing of an unskilful or negligent servant. The act of the master is the employment of the servant; but from that no immediate prejudice arises to those who may suffer from some subsequent act of the servant. If this were otherwise the plaintiffs in the cases mentioned in 1 Lord *Raym.* 739. (one where the servants of a carman through negligence ran over a boy in the streets and maimed

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maimed him ; and the other, where the servants of *A.* with his cart ran against the cart of *B.* and overturned it, by which a pipe of wine was spilt ;) must have been non-suited from their mistaking the proper form of action, in bringing an action upon the case, instead of an action of trespass ; for there is no doubt of the servants in those cases being liable as trespassers, even though they intended no mischief ; for which, if it were necessary, *Weaver v. Ward* in *Hobart* 134. and *Dickinson v. Watson* in *Sir Thomas Jones* 205. are authorities. But it must not be inferred from this that in all cases where an action is brought against the servant for improperly conducting his master's carriage, by which mischief happens to another, the action must be trespass. *Michael v. Allestree* in 2 *Levinz* 172. where an action on the case was brought against a man and his servant for breaking a pair of horses in *Lincoln's Inn Fields*, where being unmanageable they ran away with the carriage and hurt the plaintiff's wife, is an instance to shew that trespass on the case may be the proper form of action. And upon a distinction between those cases where the mischief immediately proceeds from something in which the defendant is himself active, and where it may arise from the neglect or other misconduct of the party, but not immediately, and which perhaps may amount only to a non-feazance, we held in *Ogle v. Barnes*, 8 *Term Rep.* 188. that the plaintiff was entitled to recover. The case of *Savignac and Roome*, 6 *Term Rep.* 125. which was much pressed as supporting this action, came before the Court on a motion in arrest of judgment ; and the only question decided by the Court was, that the plaintiff could not have judgment, as it appeared that he had brought an action on the case for that which in law was a trespass : for the declaration there stated that *the defendant* by his servant

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servant wilfully drove his coach against the plaintiff's chaise. *Day v. Edwards*, 5 Term Rep. 648. was also mentioned; which was an action on the case, in which the declaration charged the defendant personally with furiously and negligently driving his cart, that by and through the furious negligent and improper conduct of the defendant the said cart was driven and struck against the plaintiff's carriage: and on demurrer the court were of opinion, that the fact complained of was a trespass. And in the last case that was mentioned of *Brucker v. Froment*, 6 Term Rep. 659. the only point agitated was, Whether evidence of the defendant's servant having negligently managed a cart supported the declaration, which imputed that negligence to the defendant: and the Court with reluctance held that it did, on the authority of a precedent in Lord Raymond's Reports 264. of *Turberville and Stamp*. In none of these cases was the point now in question decided; and those determinations do not contradict the opinion we now entertain, which is, that the plaintiff cannot recover, and that a nonsuit must be entered.

Per Curiam, Rule absolute for entering a nonsuit (a).

(a) See *Morley v. Gaisford*, 2 H. Blac. 442. where it was holden that case and not trespass was the proper remedy for an injury done to the plaintiff's chaise by the servant of the defendant so negligently driving his carriage that it struck against the plaintiff's chaise and broke it. The Court said, "it was difficult to put a case where the master could be considered as a trespasser for an act of his servant which was not done at his command,

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BIRD *against* APPLETON.Thursday,
Nov. 27th.

THIS came on upon a motion for the master to review his taxation in an action upon two policies of insurance, one being upon the ship, and the other upon the cargo. On the first trial the jury having found an imperfect special verdict (*a*), this Court directed a venire de novo; and upon the second trial the jury having found entire damages upon the whole declaration, instead of giving distinct damages on each count, a new trial was directed (*b*); and the jury having found again for the plaintiff, the Court gave judgment for him on the first count of his declaration. And the question now for the Court to decide was, whether the plaintiff were entitled to the costs of any other than the last trial. The matter was argued at some length at the bar by *Perceval* in support of the rule, the effect of which was to confine the costs to be taxed on the last trial only; and by *Lushington* and *Laro* contra. The Court, to make an end of any doubt in future upon the practice, took time to consider of their judgment. And now

After a venire de novo awarded upon an imperfect special verdict, and a new trial granted after a verdict for the plaintiff on the second trial, and the jury find again for the plaintiff on the third trial, he is only entitled to the costs of the last trial, unless it be otherwise expressed in the rule granting the new trial.

(*a*) The venire de novo was awarded because the jury had found the evidence only of a fact instead of the fact itself on which, the defence was founded.

(*b*) The second count on the policy on the ship was finally abandoned by the plaintiff's counsel on this ground, that as the policy on the ship attached "at and from *Canton*," including a period of time when an illegal cargo before taken in at *Bombay*, in contravention of the laws of this country, was still on board, and as the immediate voyage and adventure insured could not be divided into parts, the whole must be deemed an illegal adventure. *Vide Bird v. Appleton*, 3 Term Rep. 564.

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Lord KENYON C. J. delivered their unanimous (c) opinion. After stating the facts as abovementioned, and the question for their determination, his Lordship proceeded as follows. This is a question which depends not on any abstract reasoning, but must be governed altogether by the settled practice of the Court. The rule of this Court as laid down in the cases of *Mason v. Skurry*, *Dougl.* 437. and in *Shoolbred v. Nutt*, *Michaelmas*, 23 *Geo.* 3. referred to in a note in *Dougl. Hankey v. Smith*, 3 *Term Rep.* 507, and *Smith v. Hall*, 6 *Term Rep.* 71, in which the case of *Davilla v. Herring* in 1 *Strange* 300, now relied on for the plaintiff, was cited and considered by the Court, is that the costs of the first trial shall not be allowed, though the verdict has gone the same way, unless so expressed in the rule granting the new trial; and if the rule be silent in that respect, the costs of the first trial are never allowed, whichever way the verdict may go upon the second trial. In the court of Common Pleas the rule is different (d): there if a new trial be granted, and the rule say nothing about costs, if the verdict on the second trial go the same way, the party succeeding has the costs of both trials; but if the verdicts go different ways, the party ultimately succeeding has not the costs of the first trial. Though the practice of the two courts differ in these respects, they both lead to the same end; and the discretion of the one court, as to the terms upon which a new trial shall be granted, is not more fettered than that of the other. On granting a new trial both

(c) LAWRENCE J. was present in Court when the case was argued.

(d) *Vide Trelawney v. Thomas*, 1 H. Blac. 641.

courts can give such directions as they think just respecting the trial, which has been had: the parties themselves may apply to have the general rule varied upon granting the new trial, if they shall be so advised: but if nothing be then said about the costs, it must be intended that in the judgment of the Court it's general rule suited the justice of the case, and that the parties themselves did not feel they had any ground to vary it. The practice being thus settled, wherever there has been a second trial, by a series of uniform cases, subsequent to the case of *Davila* and *Herring* up to the present time, there is no ground for the master allowing the plaintiff his costs of the first trial of this action after the granting the venire de novo. And as to the case of *Booth v. Atherton*, 6 Term Rep. 144, which was cited for the plaintiff, that was considered by the Court as distinguishable from the cases which guide us in our present opinion; and it never was by that intended to impeach the rule which had been established as to costs, where there was a second trial. With respect to the costs of the trial which was had on the original venire, we think that according to the cases of *Aflee* and *Grant* and *Lickbarrow v. Mason*, the plaintiff is not entitled to the costs of that trial. In *Aflee* and *Grant* (a) the then master Mr. *Benton* allowed the defendant the costs only of the second trial; and in *Lickbarrow* and *Mason*, which is in the 6 Term Rep. 131, Mr. *Wood* upon the authority of the case of *Burchall v. Ballamy* in 5 Burr. 2694, which upon this occasion has been relied on for the plaintiff, applied to the Court to direct the master to review his taxation, and to allow the costs of the first trial; but the Court refused to grant the rule nisi; being of opinion,

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(a) Vide 6 Term Rep. 131.

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that where a venire de novo is awarded, the party ultimately succeeding is only entitled to the costs of the last trial. For these reasons we are of opinion that the plaintiff is not entitled to the costs of the two first trials. And therefore this rule for the master to review his taxation of costs in the cause now before the Court must be made absolute.

Per Curiam,

Rule absolute (a).

(a) So when upon setting aside a nonsuit the costs are directed to abide the event, though the plaintiff succeed on the second trial he is not entitled to the costs of the first; neither is the defendant in such case entitled to the costs of the first trial. *Austen v. Gibbs*, 3 Term Rep. 619. In that case the master considered that where the costs were directed to abide the event, the costs of the first trial only followed the costs of the second if the same party succeeded on both.

Thursday,
Nov. 27th.

The King *against* The Mayor and Burgesses of Newcastle upon Tyne.

Though by the stat. 9 Ann. c. 25. § 2. the procurator of a Mandamus, to which there is a return, and issue taken on the fact, thereon, had an option to try the question in the same county in which he might have brought an action for a false return, yet if all the material facts are alleged in one county and issue taken thereon there, he cannot issue the venire facias into another county, though he might originally have alleged the facts there, and have there brought his action for a false return.

A MANDAMUS issued to the defendants directing them to admit one *W. Batson* to his freedom by reason of his service as an apprentice to a freeman of the borough. The Mandamus in the recital part alleged that every person bound apprentice to and serving for seven years one of a certain fraternity residing within the town was entitled to be admitted to his freedom and sworn in; and it then averred that *W. B.* came within all the requisite facts constituting the custom, and amongst others that he did serve one *R. R.* one of the fraternity as an apprentice for seven years; all which facts were alleged

to have happened within the town of *Newcastle*. The defendants in their return to the writ, admitting the custom, alleged that *W. B.* did not as an apprentice serve the said *R. R.* on which issue was joined in the county of the town of *Newcastle*. The prosecutor notwithstanding issued the venire facias to the sheriff of *Middlesex*, intending to try the cause at the sittings at *Westminster*. Whereupon a rule was obtained calling on the prosecutor to shew cause why the writ of venire facias issued in this prosecution should not be quashed, and a venire facias awarded to the sheriff of the town of *Newcastle*, or to the sheriff of the adjoining county of *Northumberland*. Against which,

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against
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of NEWCASTLE
UPON TYNE.

Wood now shewed cause. By the stat. 9 Ann, c. 20. s. 2. after issue taken on any material fact in a return to a writ of Mandamus "such further proceedings and in such manner shall be had therein for the determination thereof, as might have been had if the person suing such writ had brought his action on the case for a false return: and if any issue shall be joined on such proceedings the person suing such writ shall and may try the same in such place, as an issue joined on such action on the case should or might have been tried," &c. By this statute therefore, though the proceedings properly originated in *Newcastle*, yet the prosecutor may try the issue in *Middlesex* in like manner as he might have brought his action here for a false return (a). He also suggested

(a) Vide *Rex v. The Mayor of Oxford*, Salk. 669. and *Russel v. Suttler*, 1 Sid. 218. The venue may either be laid in the county where the subject matter of the false return arises or in *Middlesex* where the return is filed. So *Cameron v. Gray*, 6 Term Rep. 363. in the case of an action for infringing a patent.

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upon Tyne.

as a reason for issuing the venire into *Middlesex*, that the corporation of *Newcastle* were interested in the question (a).

Law and Littleton contra. The cause of action here arises altogether in *Newcastle*, and therefore the venue is properly laid there, and could not properly be laid elsewhere. But admitting that by the words of the statute of *Ann* the prosecutor had an option to try the question in *Middlesex*, yet he has precluded himself by the manner of laying the facts and taking the issue, which is all in the county of the town of *Newcastle*. And there is no instance without a special suggestion entered on the roll of awarding a venire into a county where the issue is not taken. And they referred to the cases collected in 21 *Vin. Abr.* tit. *Trial*, p. 98, &c.

Lord KENYON C. J. said that nothing was more common than for actions for false returns to writs of *Mandamus* to be tried in *Middlesex*: He remembered instances of this from *Carlisle* and *Shrewsbury*. And by the stat. of *Ann* the prosecutor had an option to have tried the question here in the same manner as in an action for a false return: but he had precluded himself by the manner in which the issue was taken; for all the facts were alleged to have happened in *Newcastle*, and the issue was taken there.

Per Curiam, -

Rule absolute.

(a) Vide stat. 33 *Geo. 3.* c. 52. s. 1. which empowers the Court to award the venire into another county on application for this purpose.

1800

The KING *against* KYNASTON.Thursday,
Nov. 27th.

GARROW on a former day obtained a rule to shew cause why a Mandamus should not issue to Mr. *Kynaston* a magistrate of the county of *Essex*, commanding him to back the warrant of distress issued by the magistrates for the borough of *Colchester* for 20*l.* 16*s.* 3*d.*, being the expences incurred by the parish of *Lexden* in the maintenance and support of *D. Glover* and *Ann* his family, and for surgical assistance &c. for the said *D. G.* in his illness, during the suspension of an order for removing him to his parish, and 30*s.* for the reasonable charges of the levy. It appeared that *Glover* on 1st of *May* 1799 as he was driving a waggon on the public road leading through *Lexden* had the misfortune to break both his legs, and was immediately taken to the workhouse there, where he continued till the 31st of *July*. On the 6th of *May* two justices of the peace took the pauper's examination and made an order for removing him and his wife, who was then attending him, from *Lexden* to *Coggeshall* in *Essex*; and at the same time the magistrates indorsed an order of suspension on the order of removal, by virtue of the stat. 35 *Geo.* 3. c. 101., stating that it would be dangerous to remove him at that time; and he continued there accordingly till the 31st of *July* when the order of removal was by their permission executed. The same magistrates afterwards made an order on the parish officers of *Great Coggeshall* to repay the parish of *Lexden* 20*l.* 16*s.* 3*d.* for expences incurred in the cure and maintenance of the pauper: and the overseers of *Great Coggeshall* not paying this within three days after demand, nor

The stat.
35 *Geo.* 3. c. 101.
s. 2. after enabling justices to suspend orders of removal of poor persons, and to order the charges thereby incurred to be defrayed by the pauper's parish, and to direct the charges to be levied by warrant of distress, enacts that if the parties against whom it is issued are out of the jurisdiction of the justice granting the warrant, it shall be indorsed by some other justice within whose jurisdiction they are: This is peremptory on the latter upon request made.

1800.

—
The KING
against
KYNASTON.

giving notice of appeal, as required by the same act, the magistrates granted a warrant of distress. But *Great Coggeshall* being without the jurisdiction of the magistrates granting the warrant, the parties applied to the defendant who was an acting magistrate within the jurisdiction of *Great Coggeshall* to indorse the warrant of distress for execution, which he refused: Whereupon the present rule was obtained.

Bayley Serjt. now shewed cause, and was proceeding to shew that the order of removal was in itself illegal, because the pauper had not come into the parish of *Great Coggeshall* to inhabit or settle there, but was detained there by an unavoidable accident; and therefore fell within the description of casual poor, who were not the objects of removal, nor intended to be made such by the act in question: and that this Court would not grant a Mandamus to enforce an illegal order. But

Lord KENYON C. J. after looking into the act of the 35 *Geo. 3. c. 101*, said it was impossible to make any question upon this part of it: It is peremptory upon the magistrate under these circumstances to indorse the warrant; he has nothing to do with the propriety of making the original order or granting the original warrant: He acts merely ministerially; in like manner as justices do in allowing a poor rate, whose signatures are mere matter of form (a). The justices indeed by whom the original order and warrant were issued had a discretion to exercise upon the matter submitted to them; but the magistrate who merely indorses the warrant of another under this

(a) Vide *Box v. The Justices of Dorchester*, 1 *Str.* 393.

act is not answerable for the legality of it, which remains at the hazard of him who first granted it. Here also the order being for payment of above 20*l.* might have been appealed against by the parties who were dissatisfied with it, and then the merits of the question might have been discussed. But the Court cannot do otherwise at present than make the

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 ———
 The KING
against
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Rule absolute.

1806.

Tuesday,
Nov. 11th.

HENRY LEGARD, MIRABELLA SHADWELL, Widow,
and JANE LEGARD, ROBERT BRAMLEY, RICHARD
HARGREAVE, and ANN his Wife, JAMES
KNIGHT and JUDITH his Wife (late JUDITH
FLETCHER), JOSEPH GOMERSALL and ELIZA-
BETH his Wife (late ELIZABETH FLETCHER),
BENJAMIN and MARY SIMPSON, and PATRICK
REID and ELIZABETH his Wife, Plaintiffs,

against

JOHN HAWORTH the Elder and DOROTHEA his
Wife, and JOHN HAWORTH the younger and
SARAH HAWORTH, TAREOTON BRAMLEY,
WILLIAM and SARAH BRAMLEY, HENRY
SHADWELL and MIRABELLA SHADWELL the
Younger, NARCISSUS HUSON, JOHN CHAR-
NOCK, and JOHN SMALLPAGE, Defendants.

AND ALSO BETWEEN

The same Plaintiffs with the Addition of
L. ROBINSON who on the Death of JAMES
KNIGHT had married his Widow JUDITH,

against

WILLIAM ASPINALL Assignee of JOHN HAWORTH
the Elder, a Bankrupt, and JONATHAN and
E. W. HAWORTH, Infants by their next
Friend, - - Defendants.

A. devised a
reversionary
estate to S. T.
and A. L. as

ON a bill exhibited in the court of Chancery to have
the will of *William Brown* established and the trusts
of it carried into effect, and to have the rights of the
several

several parties ascertained and declared, the following case was directed by the Lord Chancellor to be made for the opinion of this Court.

William Brown was at the time of making his will, and at his death, seized of the reversion in fee, expectant upon the death of *Thomas Hewitson*, of divers freehold estates in the county of *York*, and was also seized in fee in possession of other estates, situate in other parts of *Great Britain*. The said *William Brown* by his will duly executed dated 8th of *March* 1791 devised the reversion in fee expectant upon the death of the said *Thomas Hewitson*, of and in the said premises settled upon him for life, unto his the devisor's niece *Sarah Tarboton* and his sister *Ann Legard*, their heirs and assigns respectively share and share alike, to take as tenants in common and not as joint tenants; subject to and charged with the payment of 1000*l.* as therein mentioned. And the devisor provided, that in case both his said niece *Tarboton* and sister *Legard*, or either of them, should happen to die in the life-time of the said *T. Hewitson*, then he devised the share or shares of her or them so dying of and in the said premises to be settled upon *T. Hewitson* for life [subject to the payment thereof of the said 1000*l.* as thereinbefore mentioned] unto all and every such child and children, grand-child and grand-children, of his said niece *Tarboton* and sister *Legard* respectively, as should happen to be living at the time of her or their decease, and to the issue of such of them as should be then dead and have left issue, and to his her and their respective heirs and assigns forever, to take as tenants in common and not as joint

tenants in common in fee; and in case both or either of them should happen to die in the lifetime of *T. H.* (who had an estate for life in the premises), then the share or shares of her or them so dying to go
 "unto all and
 "every such
 "child and
 "children,
 "grand-child
 "and grand-
 "children, of
 "the said *S. T.*
 "and *A. L.*
 "respectively,
 "as should be
 "living at the
 "time of her
 "or their de-
 "cease, and to
 "the issue of
 "such of them
 "as should be
 "then dead and
 "have left issue,
 "and to his, her,
 "and their
 "respective
 "heirs, as
 "tenants in
 "common;
 "yet, never-
 "theless, so as
 "all the de-
 "scendants of
 "the said *S. T.*
 "should toge-
 "ther be en-
 "titled only to
 "one moiety of
 "the said pre-
 "mises, and all
 "the descend-
 "ants of the
 "said *A. L.*
 "should toge-
 "ther be en-
 "titled to no

"more than the other moiety thereof, and that none of such descendants, either of *S. T.* or *A. L.*
 "should be entitled to any greater or other share of the said respective moieties of the said respec-
 "tive premises, than his, her, or their father or mother would have been entitled to, if living;
 "under this devise the grand-children of *S. T.* and *A. L.* though in esse at the date of the will,
 "can only take per stirpes, and not per capita, in substitution of such of their parents respectively
 "as happened to be dead at the determination of *T. H.*'s life estate.

tenants :

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LEGARD
and Others
against
HAWORTH
and Others.

tenants: yet nevertheless so as all the descendants of his said niece *Tarboton* should together be entitled only to one moiety of the said premises, and all the descendants of his said sister *Legard* should together be entitled to no more than the other moiety thereof; and that none of such descendants, either of his said niece *Tarboton*, or of his said sister *Legard*, should be entitled to any greater or other share of the said respective moieties of the said premises than his her or their father or mother would have been entitled to if living. And the devisor devised unto *Dorothy* his wife for life all the rest residue and remainder of his messuages lands tenements hereditaments and real estate whatsoever and wheresoever, whether in possession reversion remainder or expectancy, and not therein before disposed of; and after her decease he devised the whole of his said real estate so settled upon his said wife for life unto his said niece *Sarah Tarboton* and sister *Ann Legard* their heirs and assigns respectively share and share alike, to take as tenants in common and not as joint tenants. And in case both his said niece *Tarboton* and sister *Legard* or either of them should die in the lifetime of his said wife, then he devised the share or shares of her and them so dying of and in the whole of his said real estate so settled upon his said wife for life unto all and every such child and children grand-child and grandchildren of his said niece *Tarboton* and sister *Legard* respectively as should happen to be living at the time of her or their decease, and to the issue of such of them as should be then dead and have left issue, and to his her and their respective heirs and assigns for ever, as tenants in common as aforesaid: Yet nevertheless so as all the descendants of his said niece *Tarboton* should together be entitled only to one moiety of the said last-mentioned premises; and all the descendants of his said sister *Legard* should together

be entitled to no more, than the other moiety thereof; and that none of such descendants should be entitled to any greater or other share of the said respective moiety thereof than his her or their father or mother would have been entitled unto if living.

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LEGARD
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At the date of the devisor's will his niece *Sarah Tarboton* had three grand-children only, viz. *Tarboton Bramley* and *William Bramley* the children of her daughter *Martha Bramley*, and *John Haworth* the younger the son of her daughter *Dorothea Haworth*; and at the same time the devisor's sister *Legard* had two grand-children only then living, viz. *Henry* and *Mirabella Shadwell* the younger. The testator died on 4th of *January* 1792. *Thomas Hewitson* died 16th of *November* 1794. The devisor's niece *Sarah Tarboton* died in his lifetime and in the lifetime of *Thomas Hewitson*, leaving at her death two children, namely, *Martha Bramley* her daughter, who survived the testator and died the 13th of *February* 1795, and *Dorothea Haworth* her daughter still living, and the three grand-children above named, two of them being the children of *Martha Bramley*, and one the child of *Dorothea Haworth*, all now living. *Ann Legard* the devisor's sister survived him, but died in the lifetime of *Thomas Hewitson* and *Dorothy Brown* the testator's widow. And the said *Ann Legard* left at her death three children and two grand children, her children were *Henry*, *Mirabella*, and *Jane Legard*, all now living; her grand-children were *Henry* and *Mirabella Shadwell* above named, the children of *Mirabella Shadwell* now living. *Dorothy Brown* the devisor's widow survived both the devisor, his niece *Sarah Tarboton*, and his sister *Ann Legard*; and died in *September* 1795. The question is, whether the grand-children of the devisor's niece *Sarah Tarboton* and of his sister *Ann Legard* took any and what estate by the will.

Holroyd,

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Holroyd, for the plaintiffs, contended that the descendants of the devisor's niece *Sarah Tarboton* and of his sister *Ann Legard*, who were the principal objects of his bounty, take only per stirpes and not per capita, and consequently that the grand children named in the will, whose parents are living, take nothing, but only the grandchildren of the parent who is dead. As to the estate settled on *Thomas Hewitson* for life, *Martha Bramley* and *Dorothy Haworth* (the daughters of *Sarah Tarboton*) took one moiety of the reversion between them, and *Ann Legard* took the other moiety, which at her death devolved on her three children *Henry* and *Jane Legard* and *Mirabella Shadwell*. As to the reversionary estate after the death of the devisor's widow, as *Martha Bramley* was dead at that time, her share devolved on her two children *T. B.* and *W. B.* who with *Dorothy Haworth* took one moiety, and the children of *Ann Legard* took the other moiety. No other construction than this is consistent with the words of the will; for the descendants of the two principal devisees are to take in such a manner "so as all the descendants of his niece *Tarboton* should together be entitled only to one moiety, and all the descendants of his sister *Legard* should together be entitled to no more than the other moiety." And this is further confirmed by the words which follow, "and that none of such descendants should be entitled to any greater or other share of the said respective moieties than his or their father or mother would have been entitled to if living." Now if the parent were living it is clear that the child could not take any share; because if he took any, it must necessarily be other share than the parent would otherwise have taken, as it would be a divided share: That shews that in no case were the children to take but in substitution of the parent. But if

a contrary construction were to prevail, that all the children and grand-children living at the time were to take nominatim, then as to the moiety of the reversion of the estate bequeathed for life to *T. Hewitson, Martha Bramley* and her two children would have taken a greater share than *Dorothy Haworth* and her one child, and *Martha Bramley's* children would ultimately take a greater share than their parent could have taken, and certainly a different share; and so of the rest. The case of *Routledge v. Dorril (a)* is an authority to shew that where an estate was directed in a marriage settlement to go in default of appointment to all and every the children and grand-children or issue living, &c. with a proviso that the issue of any children dead should not have a greater share than their parents would have had, the children of a living parent cannot take any share.

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Wetherall contra. The intent was that the descendants of the two principal devisees, at least as far as grand children, who were living at the decease of either of them should take per capita in equal shares. Nothing can be more express to this purpose than the words of the first part of the devise. In case either *Sarah Tarboton* or *Ann Legard* should die in the lifetime of *Thomas Hewitson*, then the deviser directs "that the share of her or them so dying shall go unto all and every such child or children grand-child or grand-children of *S. T. and A. L.* respectively as should happen to be living at the time of her or their decease, and to the issue of such of them as should be then dead and have left issue, and to his her and their respective heirs." Here then not only the children and grand-child-

(a) 2 Vez. jun. 357. 366.

1860.

LEGARD
and Others
against
HAWORTH
and Others.

ren, but also the issue of such as should be dead, were to take equal shares as purchasers. The only doubt which can be made arises upon the subsequent words relied on, "that none of such descendants of S. T. and A. L. respectively should be entitled to any greater or other share than his or their parent would have been entitled to if living." But in order to render the meaning of this latter part consistent with what goes before, the word *descendants* must mean descendants ultra the grand-children, who together with children were before specifically named, and in this sense such descendants might take per stirpes. In aid of this construction, it is probable that the grand children being in esse at the time were as much objects of the devisor's bounty as the children or their parents, all being specifically mentioned. It also agrees with the critical meaning of the words. It is also confirmed by decided cases, which have given a legal interpretation of such words. Arguments derived from supposed cases, in which by this construction an unequal distribution would be made, do not apply, because all the persons were in esse at the date of the will, and there is no absurdity in supposing that each was equally within the contemplation of the devisor. The state of the family at the time points out the fair construction of the will. [Lord Kenyon observed that according to the construction contended for, if a grand-child had been born after the making of the will, he would be excluded: but that that was contrary to the resolution in *Ellison v. Airey (a)*.] There

(a) 1 Vez. 111. So *Garbland v. Mayot*, 2 Vern. 105. At any rate where the devise is general to children or grand-children, none shall take but those who were in esse at the time of the testator's death. *Northey v. Strange*, 1 Pr. Wms. 341. and many other cases collected in the last edition, p. 342.

might be some doubt in that case, but at any rate that question does not arise here. It was expressly determined in *Wild's* case (a) that where the devise was to *R. W.* and his wife and after their decease to their children, there being two children living at the time, the children took as purchasers. And the distinction was expressly taken, "that if *A.* devise lands to *B.* and his children or issues, and he hath not any issue at the time of the devise, the same is an estate tail; because the intent appears that the children or issue should take, and they cannot take as immediate devisees, not being in esse; nor by way of remainder, for that was not the intent, the gift being immediate. But if *B.* had issue, then the express intent may take effect, according to the rule of the common law, and they shall have a joint estate for life. The same doctrine was laid down by Lord *Hale* in *King v. Mellish* (b). Here then the children and grand-children being in esse at the time, they must be taken to have been so named as description of personarum, and not included in the general description of *descendants*. The intent of the deviser must be considered in connexion with the settled rules of law. *Blandford v. Blandford* (c). Now here the first part of the devise is clear, and according to the legal construction of the words the children and grand children would take per capita. The latter part points to a different construction, that the estate should be transmitted per stirpes. The two intents cannot take effect co-extensively. Either then the word *descendants* in the latter part must be confined to descendants ultra grand children, in which case both intents may be carried into execution as far as they are compatible. Or if one must

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(a) 6 Co. 17.

(b) 1 Ventr. 231.

(c) 1 Rol. R. 319.

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superfede the other altogether, as it is doubtful which is to prevail, the construction must be according to the common law rules of conveyancing; and then the children and grand-children will take per capita. *Daniel v. Uply* (a); and *Taylor v. Sayer* (b). As to *Routledge v. Dorril* (c), it was a question on the construction of a marriage settlement, in which case a court of equity take a greater latitude in construing and modelling it in order to effectuate the intention of the parties for the benefit of the family than a court of law would do upon the words of a will; for there is no conscience in construing a will as there is in respect to marriage articles.

Holroyd in reply. *Routledge v. Dorril* was upon the construction of a power of appointment in a marriage settlement; and at the time of the testatrix's death, who executed the power by her will, the grand-children were living: but no stress was laid upon that. *Wild's* case only shews that children being in esse at the time of the devise were capable of taking under that general description, 'if such appeared to be the intent of the deviser. But here the intent appears to be that the grand-children should not take as co-devisees with the children. The devise is not to the grand-children and their issue, but to the issue of such as should be dead; and it is given to them "so as," &c. which shews that they were not to take but as representatives of their parents. The word *descendants* cannot mean *ultra* grand-children; for that would be to exclude children and grand-children, which is directly contrary to the plain import of the words used.

(a) *Latch.* 136.(b) *Cro. Eliz.* 743.(c) 2 *Vez.* 357.

Lord KENYON C. J. At present it appears to me that the case of *Routledge v. Dorril* was well decided, and that it is an authority in point for the construction of this devise. The principal words to be attended to are these ;
 “ Yet nevertheless so as all the descendants of his said
 “ niece *Tarboton* should together be entitled only to one
 “ moiety, &c. and all the descendants of his said sister
 “ *Legard* should together be entitled to no more than
 “ the other moiety ; and that none of such descendants
 “ should be entitled to any greater or other share of the
 “ said respective moieties than his her or their father or
 “ mother would have been entitled to if living.” According to the fair interpretation of these words no case can be put where the parent and children were to take together. If the first devisees were alive, they were to take ; if they were dead, their respective moieties were to go to their respective children ; if these died, then those who represented them respectively should take in loco parentum. Very proper stress has been laid upon the words, “ that none of such descendants should be entitled to any greater or other share than the parent if living would have been entitled to.” That necessarily supposes that if the father or mother had been living they would have taken in exclusion of their children. The answer attempted to be given to the case of *Routledge v. Dorril* is not well founded : As a general proposition it is clear that the intention of the parties to an instrument must both in law and equity govern the construction of it so far as the rules of law will permit ; and there cannot be a different rule of construction upon the same words in the different courts. It is true the courts of equity have sole cognizance of trusts ; but if the question be sent

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here in the shape of a devise of a term of years, this Court must put the same construction as a court of equity would do upon the same words. We will however consider of our opinion and certify it to the Lord Chancellor.

LAWRENCE J. The word "descendants" cannot, as contended for, be taken in exclusion of children and grand-children; for the testator speaks of all the descendants of his niece *Tarboton* and of his sister *Legard*, which must include children and grand-children; and then says that "none of such descendants shall be entitled to any greater or other share" than the parent would have been entitled to if living.

Afterwards the following certificate was sent to the Lord Chancellor :

This case has been argued by counsel; we have considered it, and are of opinion, that *Tarboton Bramley*, and *William Bramley*, the grand-children of the testator's niece *Sarah Tarboton*, being the children of her daughter *Martha Bramley* (which *Martha Bramley* died in the life time of the testator's widow *Dorothy Brown*, but survived *Thomas Hewitson*), took each one undivided eighth part as tenants in common in fee in the premises, whereof the said testator was seised in fee in possession, and which he devised to his said wife *Dorothy Brown* for her life: and as to the premises whereof the said testator was seised in fee simple in reversion expectant upon the death of *Thomas Hewitson*, that the said two grand-children of the said *Sarah Tarboton* did not take any estate by the said testator's will.

We are also of opinion, that *John Haworth* the younger, another grand-child of the testator's niece *Sarah Tarbolton*, being the son of her daughter *Dorothy Haworth*, who is still living (having survived both *Thomas Hewitson* and *Dorothy Brown*), did not take any estate in any of the premises under the said will of the said testator. And also that *Henry Shadwell* and *Mirabella Shadwell*, the two grand-children of the testator's sister *Ann Legard*, being the children of her daughter *Mirabella Shadwell*, who is still living (having survived both the said *Thomas Hewitson* and the said *Dorothy Brown*), did not take any estate in any of the premises devised by the will of the said testator.

26th January 1801.

KENYON.
N. GROSE.
S. LAWRENCE.
S. LE BLANC.

REGULA GENERALIS

Trinity Term 40 GEO. III. (a)

IT IS ORDERED that, from and after this Term, the Paper Books in causes entered with the Clerk of the Papers of this Court for argument on *Tuesdays* shall be delivered to the Lord Chief Justice and the rest of the justices of this Court on the *Saturday* next preceding that day; and that those entered for argument on *Fridays* be delivered as aforesaid on the *Tuesday* next preceding the same; with such marginal notes as are directed by the rule made in *Hilary* Term in the 38th year of the reign of his present Majesty.

Regulation concerning the time for delivering paper books in cases entered for argument.

(a) This was omitted in the Report of the last Term.

REGULA GENERALIS

Michaelmas Term 41 Geo. III.

Service of rules,
&c. after 10
o'clock at night
shall not be valid.

IT IS ORDERED that, from and after the first day of next *Hilary* term, no rules orders or notices in any cause or matter depending in this Court shall be served, or any proceedings or pleadings delivered or served, later than 10 of the clock at night; and that any service or delivery thereof after that hour shall be null and void.

THE END OF MICHAELMAS TERM.

C A S E S

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Forty-first Year of the Reign of GEORGE III.

1800.

COUTANCHE *against* LE RUEZ.

Saturday,
January 24th.

THE defendant was arrested in *Trinity* vacation 1799, under a writ issued against him and several others, returnable in *Michaelmas* term; and special bail was then put in and justified for the defendant, and the plaintiff proceeded to outlaw the other parties named in the writ, which outlawry was not completed till the fourth return of last *Easter* term: after which the plaintiff delivered his declaration, entitled generally of that term, wherein was contained the usual averment, that the other parties were outlawed. The defendant pleaded, *inter alia*, nul tiel record of outlawry, on which issue was joined; and thereupon a day was given to the plaintiff in *Michaelmas* term last to bring in the record; on which day, in order

Leave given to amend the declaration by entitling it of the day on which it was actually delivered, instead of the term generally, in order to accord with an averment therein, that other defendants named in the writ were then outlawed.

1800.

COUTANCHE
against
LE RUZZ.

to avoid being concluded by the production of the judgment of outlawry, which appeared to be of a day subsequent to the first day of term, to which the declaration, being entitled generally, referred; the plaintiff obtained a rule calling on the defendant to shew cause why the plaintiff should not be at liberty to amend his declaration by entitling it as of a particular day in *Easter* term, (being the day on which it was in fact delivered, and which was after the outlawry was complete), instead of *Easter* term generally: and the Court ordered the production of the record of outlawry to be postponed in the mean time.

Giles now shewed cause, insisting that the amendment proposed would make the proceedings still more irregular; for according to *Smith v. Muller* (a), the declaration ought to be entitled of the term when the writ is returnable, although not filed till a term subsequent; and therefore the amendment, if any, should be to entitle it of a time prior instead of subsequent, according to the practice of the Court, from which the plaintiff had deviated in the first instance. But at any rate the application to amend came too late after the expence of all the pleading was incurred, at least except upon payment of all the costs.

Hovell, in support of the rule, said, that the amendment prayed for was according to the truth of the fact; and cited *Symonds v. Parmenter and another* (b) as in point. To which

The Court agreed; and added, that as the day on which the declaration was delivered now appeared to be material, which probably did not appear when it was first

(a) 3 Term Rep. 624.

(b) 1 Will. 78.

drawn and entitled, there could be no objection to amend the title of it according to the truth and justice of the case. Therefore they made the

Rule absolute (a).

on payment of the costs of the amendment.

(a) In *Dickinson v. Plaisted*, 7 Term Rep. 474. the Court gave leave to amend a record by inserting a special memorandum of the day when the plaintiff's bill was filed, after a writ of error brought. Amendments of this nature are allowed or refused in the discretion of the Court, according as they are conducive or not to the ends of justice. *Rex v. The Mayor, &c. of Grampound*, 1b. 703—5.

1800.

COUTANCHE
against
LE RUEZ.

MYRTLE against BEAVER.

Tuesday,
Jan. 27th.

THIS was an action for goods sold and delivered, tried before Lord Kenyon at the last Summer Assizes at Lewes. The defendant was Major and Captain of a troop in the *Hants* regiment of Fencible Cavalry. The defendant was a butcher at *Brighton*, where the troop was quartered. The action was brought to recover the value of meat furnished for the use of the troop between the 25th of *January* and the 22d of *February* 1800. Previous to the first mentioned period the defendant had the command of his own troop at *Brighton*, and had employed a serjeant in the troop, of the name of *Bedford*, to act as his clerk in providing for the subsistence of the troop, which it is the duty of the Captain to do; and under the defendant's orders *Bedford* had from time to time given orders for and superintended the delivery of the meat; and while the defendant remained with the troop he had himself regularly paid the plaintiff his bill monthly; and the account was admitted to be settled up to the 24th of *January*. At that period the defendant

A Captain of a troop, during the time of his absence, and while another officer is in the actual command of it, and by whom the orders for subsistence are issued, and the subsistence money is received from Government, is not liable to pay for subsistence furnished to the men, though he was still entitled to a profit upon the sum issued on that account, and the troop still continued under his military orders.

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was detached with a small party to command at *Arundel*, about 20 miles off, the greatest part of the regiment remaining at *Brighton* under the command of the Colonel. On the defendant's departure the actual command of his troop devolved upon Mr. *Hunt* the First Lieutenant, though they were still subject to the defendant's military orders, and all military reports and returns of the troop were made first to him, and from him to head quarters. After the defendant's departure from *Brighton* serjeant *Bedford* received his orders from Lieutenant *Hunt* for the subsistence of the men, and received money from him for such purposes, and was employed by him, as he had before been by the defendant when he was present, to give orders for and superintend the delivery of the meat, which he did in the same manner as before; but it did not appear that such change of his authority was made known to the plaintiff, who continued to supply the meat as before. On the 20th of *February*, and before the usual time for settling the plaintiff's bill, Lieutenant *Hunt*, who besides his command in the troop was also paymaster of the regiment, absconded, without settling any of his regimental accounts, and leaving this demand among others unsatisfied. It appeared to be the course of the service that a certain allowance is made by Government to the Captain of every troop for the subsistence of the men, upon which he derives an allowed profit to himself, and to which he was still entitled during his absence on the detached command at *Arundel*. This subsistence money is issued every month from the agent of the regiment to the paymaster in advance, by whom it is paid over to the captains of troops, who draw upon the paymaster for it at their pleasure. The agent of the regiment regulates the amount of the monthly issue to the paymaster by the muster-

muster-rolls, and the bills which have before been sent in, and these are signed by the captain of the troop while he is in the actual command; but during the period in question, in which the plaintiff's bill accrued, returns of this nature were signed by *Hunt* and sent in to the pay-office: and this allowance was in the course of the service received by *Hunt*, but was not in fact paid over by him to the defendant during the period that he was in the actual command of the troop. The paymaster is recommended by the colonel of the regiment, and approved by the king, to whom he gives a bond to perform the duties of his office, and account faithfully, and to repay the surplus if any in his hands. For some days, at the latter end of *January* and beginning of *February*, the Colonel was absent from the regiment, and during that time the principal command devolved upon the defendant, as Major and next in seniority, who came over to and resided at *Brighton*, but *Hunt* still continued to have the actual command of the defendant's troop. Lord *Kenyon* was of opinion at the trial, that the defendant was not answerable; he not having been in the command of the troop during the whole period within which the goods were supplied, but *Hunt* having then the actual command; and the goods having been ordered by *Bedford*, acting at that time under *Hunt's* authority; and *Hunt* having received the money from the agent for this purpose, and having given bond to account for it; and the returns having been made during the same period by him to the agent, by which the issues of money are regulated. But a verdict was taken for the plaintiff, with leave to the defendant to move to enter a nonsuit, if this Court should be of the same opinion with his lordship.

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Shepherd Serjt. accordingly obtained a rule nisi for this purpose last term; against which

Garrow, Adam, and Marryat, now shewed cause. The Captain of the troop is the person by whom the orders for providing subsistence for the men are regularly issued. *Bedford* was appointed by the defendant as his agent for this purpose in the first instance, and the same person continued to give the orders during his absence. The plaintiff had no reason for supposing that *Bedford* was acting under the command of another: there was no notification of any such change to him. The defendant was not so far removed at *Arundel* from his situation of responsibility as to have lost the command of his troop. Though absent at other quarters a few miles off, the troop was still virtually under his command; for all military reports and returns were made to him as Captain. But, what is of most importance, he was still entitled to receive the emoluments arising from his command, part of which accrues from these very payments. Subsistence money is paid in advance by Government; and therefore it was in the defendant's power to have obtained the money for the period in question from the paymaster; it appears that he was in command at *Brighton* after the time when it must have issued to the paymaster, and if he did not obtain it, it was his own laches.

Lord KENYON C. J. It is an undisputed fact that the defendant was not in the actual command of his troop during any period of the time when this demand accrued; but the command had devolved upon another officer who was next in seniority. The defendant neither gave the orders for the provisions, nor had he any authority

rity to do so. It is true that the serjeant acted at first by the defendant's orders; but he is not to be considered as the agent of a private individual; it was plain that he acted as agent for whatever officer happened to have the command of the troop. The defendant has never received any money from Government for this purpose; but the money was received by *Hunt*, who was next in command as well as paymaster, and by whom it ought to have been paid over. So that on the whole there appears to be no ground for fixing the defendant with a liability in this case.

Per Curiam, Judgment of nonsuit to be entered.

ETHERTON *against* POPPLEWELL.

Tuesday,
Jan. 27th.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and continuing there for three months, and expelling the plaintiff therefrom, and taking and detaining his goods in the house for the same space of time. And a second count for the asportation alone. Plea not guilty. At the trial before *Thomson B.* at the last assizes at *Wells*, it appeared that the plaintiff was tenant of the premises to the defendant under a holding originally from *Lady-day* 1790, at an annual rent of three guineas, which by an agreement in writing was reserved quarterly; but before the year 1798 the rent had been agreed to be raised to five guineas; under what terms did not appear. On the 10th of *March* 1800 (the plaintiff having before absconded, and no rent having been paid since the preceding *Lady-day*) the defendant accompanied by the tything-man entered the plaintiff's house, in which his wife still remained, and seized his goods under the fol-

Trespass lies against a landlord, who on making a distress for rent turned the plaintiff's family out of possession, and kept the premises on which he had impounded the distress.

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lowing notice: “ *John Etherton*, take notice, that I have
 “ this day seized and distrained the goods and chattels
 “ hereunder set down, which are to remain in a house
 “ situate in the parish of *Street*, in the county of *Somerset*,
 “ which you rent of me, for the sum of 6*l.* 6*s.*, being
 “ for the rent of the said house due from you to me on
 “ the 25th day of *March*; and if you do not discharge
 “ the said rent and charges of distress, or replevy the said
 “ goods and chattels within five days *from the 25th of*
 “ *March ensuing the date hereof*, the same will be appraised
 “ and sold according to the act of parliament,” &c.
 Dated the 10th *March* 1800, and signed by the defendant
 and the tythingman. Then followed an inventory of the
 goods, with a charge to the plaintiff at his peril to remove
 them before the day of sale. The goods were not in
 fact removed from the premises, but the defendant after-
 wards turned the plaintiff’s wife out of the house, and
 locked it up, and kept the key. On the 30th of *March*
 the plaintiff having returned again paid the defendant five
 guineas for a year’s rent due the *Lady-day* preceding, and
 one guinea for a calf; and at the same time desired to
 have the key of his house again; to which the defendant
 answered, that he should come to his house, where he
 should be back in a quarter of an hour. The plaintiff ac-
 cordingly went there, and having staid an hour and a half,
 and the defendant not returning, he went away. In a
 day or two afterwards, however, the plaintiff was proved
 to be in possession again, but at what time he went in did
 not exactly appear. It was also proved, that previous to
 the 10th of *March*, when the distress was made, the de-
 fendant had said, that the plaintiff owed him nothing but
 a year’s rent *and a guinea for a calf*, and that he should
 seize for the whole; and being told that he would do
 wrong

wrong in seizing for the calf, he answered, that he should seize for the whole, as no one would take the plaintiff's part.

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It was objected at the trial by the counsel for the defendant, that the increased rent of five guineas must be deemed to be payable quarterly, as the original rent was so reserved; and that therefore three quarters of a year's rent being due at the time of the distress, the distress was lawful; and that if the plaintiff had any cause of action for the excess, he should have brought an action on the case, and not an action of trespass. The learned Judge, however, would not nonsuit the plaintiff, and the jury gave a verdict for the plaintiff with two guineas damages; the defendant having liberty to move the court to enter a nonsuit if they thought the present form of action wrong. Such a rule was accordingly obtained in the last term, against which

Bond was now to have shewn cause. But *the Court* asked the defendant's counsel what objection could be made to this form of action for the excess of which the defendant had been guilty in this transaction, in turning the plaintiff's wife out of possession, and keeping possession of the house even after the rent was paid.

Gibbs in support of the rule. By the stat. of *Marlbridge* (a) distresses must be reasonable, and not excessive; but the only remedy for any excess in making them is by an action on the case founded on the statute, and not an

(a) 52 H. 3. c. 4.

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action of trespass (*a*). Now here the entry was originally lawful for the purpose of distraining for the three quarters rent in arrear; and what followed was consequential to the first act; and however irregular, it is only the subject matter of an action on the case, and not of trespass. The continuing in possession, and turning the plaintiff's wife out of doors, were done with a view of better securing the distress, and in furtherance of that object only.

LORD KENYON C. J. No answer can be given to the action of trespass for the excess of the defendant's conduct in the subsequent part of the transaction, in turning the plaintiff's wife out of possession, which she held for her husband. If the question had depended merely upon the extent for which the distress was declared to be taken at the time, it might have admitted of a different consideration; for certainly the party would not have been concluded by that declaration; for a person may distrain for one thing and justify for another (*b*). Here the parties are at issue upon the plea of not guilty; there is no new assigment, and so no question upon that ground can arise; and we cannot say that the defendant has not been guilty of a trespass upon this evidence.

GROSE J. The defendant not only turned the plaintiff's family out of possession at the time, but continued in possession of the house even after the rent was paid.

Per Curiam,

Rule discharged.

(*a*) *Hutchins v. Chambers*, 1 Burr. 550. So in *Lynne v. Moody*, Fitzg. 85. and 2 Stra. 851. where it was holden that trespass would not lie for an excessive distress, because the first entry was lawful; and, say the Court there, "Here is nothing subsequent to make it a trespass, as there is where the distress is abused."

(*b*) *Crowther v. Ransbottom*, 7 Term Rep. 654.

1800.

The KING *against* WADDINGTON.*Wednesday,*
Jan. 28th.

AN information was filed, by leave of the Court, against the defendant, containing several counts; the first of which charged, that he on the 29th of *March* 1800, at *Worcester*, &c. wickedly intending to inhanche the price of hops, did spread divers rumours and reports with respect to hops, by then and there openly and wickedly, in the presence and hearing of divers hop-planters and dealers in hops and others then being at *Worcester*, &c. declaring and publishing that the then present stock of hops was nearly exhausted, and that from that time there soon would be a scarcity of hops, and that before the hops then growing could be brought to market the then present stock of hops would be exhausted; with intent and design by such rumours and reports to induce divers persons unknown then present, being dealers in hops, and accustomed to sell hops, and having large quantities of hops for sale, not to carry or send to any market or fair any hops for sale, and to abstain from selling such hops for a long time, and thereby greatly to inhanche the price of hops; in contempt, &c. to the evil example, &c. and against the peace, &c. The second count stated more generally, that the defendant at the day and place aforesaid, wickedly intending and contriving to inhanche the price of hops, did openly publish and spread divers rumours and reports with respect to hops, to the effect following, (viz.) that the then present stock of hops was nearly exhausted, and that there would soon be a scarcity of hops, and that before the hops then growing could be brought to market the then present stock of hops would be exhausted; with intent by

Offences at common law.

1. Spreading rumours with intent to inhanche the price of hops in the hearing of hop-planters, dealers, and others, that the stock of hops was nearly exhausted, and that there would be a scarcity of hops, &c. with intent to induce them not to bring their hops to market for sale for a long time, and thereby greatly to inhanche the price.

2. Spreading such rumours generally with intent to inhanche the price of hops.

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3. Endeavouring to inhance the price by persuading divers dealers, &c. not to take their hops to market, and to abstain from selling for a long time.
 4. Ingrossing large quantities of hops, by buying from many particular persons by name, certain quantities, with intent to re-sell the same for an unreasonable profit, and thereby to inhance the price.
 5. Ad idem, stating the particular contracts.
 6. Getting into his hands large quantities, by contracting with various persons for the purchase, with intent to prevent the same being brought to market, and to re-sell at an unreasonable profit, and thereby greatly to inhance the price.
- such rumours and reports as aforesaid to inhance the price of hops, in contempt, &c. The third count charged, that the defendant unlawfully endeavoured to inhance the price of hops by persuading and attempting to persuade divers persons dealing in hops and accustomed to sell hops, and having large quantities of hops for sale, not to go to any market or fair with any hops for sale, and to abstain from selling such hops for a long time, in contempt, &c. and against the peace, &c. The fourth count charged, that the defendant unlawfully engrossed and got into his hands by buying a certain large quantity of hops, viz. 100 pockets of hops of one *W. G.* (and so on of above 30 other persons, naming them) at certain large prices, viz. 15*l.* for each 100 cwt. with intent to re-sell the same for an unreasonable profit, and thereby to inhance the price of hops. The fifth count charged, that the defendant got into his hands a certain large quantity, viz. 3700 pockets of hops by contracting with *W. G.* (and many other persons, naming them) to buy and take of them the same, by persuading and procuring them to sell and deliver to him the said quantity of hops at certain large prices, viz. 13*l.* for every hundred weight which should be delivered to him on the 3d of *May* then next following, and 14*l.* for every hundred weight delivered to him on the 19th of said *May*, and 15*l.* for every hundred weight delivered to him on the 31st of the said *May*; with intent to re-sell the said hops for an unreasonable profit, and thereby greatly to inhance the price of hops. The sixth count charged, that he got into his hands another large quantity of hops, by contracting for the purchase of a certain quantity from a variety of persons named, at certain large prices, with intent to pre-

vent the same from being brought to market for sale, and to re-sell the same for an unreasonable profit, and thereby greatly to inhanse the price of hops. The seventh count charged, that the defendant bought and caused to be bought and got into his hands a certain large quantity of hops, by buying of one *W. G.* a certain large quantity, viz. 500 cwt. (and so of above twenty other persons) with the like intent as in the last count. The eighth count was to the same effect as the last, alleging only the intent to be, to re-sell the hops for an exorbitant profit, and thereby greatly to inhanse the price. The ninth count charged generally, that the defendant unlawfully engrossed and got into his hands, by buying of divers persons unknown, divers large quantities, viz. 500 tons of hops, with the like intent as last mentioned. And all the counts laid the offence to be in contempt of our Lord the King and his laws, to the evil example of all others, &c. and against the King's peace, &c.

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7. Buying like quantities with like intent.

8. Buying like quantities with intent to re-sell at exorbitant profit, &c.

9. Unlawfully engrossing, by buying large quantities with like intent.

Upon this information the defendant was convicted before *Le Blanc J.* at the last assizes at *Worcester* after a very long trial, and was brought up in *Michaelmas* term last to receive the judgment of the Court. On that occasion it was intended by the defendant's counsel to move in arrest of judgment, of which they had given notice; but when the matter was about to be argued, the defendant, who was present in court, desired to wave all objections in arrest of judgment; in consequence of which his counsel suggested, that the same arguments which might be urged in arrest of judgment would in another shape avail the defendant in mitigation of the sentence; and they were proceeding to model their address accordingly. But

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The Court said, that although the defendant had thought proper to waive any objection in arrest of judgment, yet if upon a review of the whole case they were satisfied he had not been guilty of any offence, they should not give judgment against him. According to what had been said with great wisdom and justice by Lord *Mansfield*, in the case of *The King v. Gough (a)*, on a question respecting the propriety of granting a new trial in a criminal case, where the motion had not been made within the regular time; that if the defendant could shew that he had not been guilty of any offence, it was never too late to take advantage of it; and that the Court would inflict no punishment if there had been no offence. They therefore expressed a desire to hear any arguments in whatever shape urged which went to do away the offence altogether.

In consequence of this intimation, the arguments after mentioned at the bar, though not urged regularly in the form of a motion in arrest of judgment, yet in effect took the same course. And after *Le Blanc J.* had reported to the Court the evidence given at the trial; which it is not necessary here to detail, especially as the material facts appear upon the face of the indictment, and the substance of the general proof is stated in the judgment which was afterwards pronounced against the defendant;

Law, Dauncey, Wigley, and Peake, in the course of their address to the Court in mitigation of punishment, urged the following arguments. The facts charged against the defendant never constituted any offence, even previous to the stat. 12 Geo. 3. c. 71.; but if they did, the offences

(a) Vide *Dougl.* 797, 8.

stated in each count and all others ejusdem generis were done away by that statute, which went to repeal not merely the particular acts of parliament therein enumerated, but the whole system of laws respecting forestalling, regrating, and ingrossing. The act of the 5 & 6 Ed. 6. c. 14. is supposed to describe what the common law was in these respects, and that describes (a) an 'ingrosser to be one who "shall ingross or get into his hands by buying, "contracting, or promise taking, (other than by demise, "grant, or lease of land or tithe,) any corn growing in "the fields, or any other corn or grain, butter, cheese, "fish, or other dead *viſtuals* whatsoever, within the realm "of England, to the intent to sell the same again." To constitute the offence therefore with which the defendant is charged in the fourth and subsequent counts, the ingrossing must be of some commodity which constitutes *viſtuals*. But hops have been expressly adjudged to be no *viſtuals* within the meaning of that act, upon a reference to the Judges in the 20 Jac. 1., as was said by *Rolle C. J. Styl. 190.* and *Rex v. Maynard, Cro. Car. 231.* (Lord *Kenyon* observed, that that resolution was before the stat. 9 Ann. c. 12. s. 24. had prohibited common brewers under a penalty from using any other bitter than hops in brewing beer: since which time at least it was impossible to say that hops were not a *viſtual*.) The same thing is repeated, and the same authority is cited by Lord Chief Baron *Comyns*, in the 4th vol. of his *Digest* 69. tit. *Justices of Peace—Ingrossing*; which work was compiled after the statute. And the same matter is to be found in all the abridgments since that period; and in 1 *Hawk. P. C. c. 80. s. 17.* It is not indeed inserted in 3 *Inst. 195.* in

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the chapter on this subject; but that work is defective in many respects. But however doubtful this case might have been before the repeal of the stat. 5 & 6 Ed. 6., and certainly there had always been much fluctuation of opinion as well upon the definition of the offences themselves therein described as upon the policy of the laws against them; at any rate those doubts were intended to be removed, and the whole system of this branch of law altogether done away by the act of the 12 Geo. 3. c. 71. This is most apparent from the resolutions of the Committee of the House of Commons, to whom it was referred by the House to make a report upon these laws; in which Committee are to be found the names of some of the most enlightened statesmen of the age: and by them it was resolved (a), “that the several laws relating to badgers, engrossers, forestallers, and regrators, by preventing the circulation of and free trade in corn and other provisions, have been the means of raising the price thereof in many parts of this kingdom. 2dly, That the House be moved for leave to bring in a bill to remedy the evils occasioned by the said laws.” It was thereupon ordered by the House nemine contradicente, “that leave be given to bring in a bill for remedying the evils occasioned by the laws now in being relating to badgers, engrossers, forestallers, and regrators.” The preamble of the stat. 12 Geo. 3. c. 71. which followed thereupon, also stating that the restraints laid by several statutes upon the dealing in corn, &c. and sundry other sorts of victuals, by prevent-

(a) *Com. Journ. Vol. 33. p. 590.* These resolutions were first reported on the 8th of April 1767, from the Committee who were appointed to consider of the laws relating to badgers, engrossers, forestallers, and regrators, and to report their opinion to the House, which of the same were fit to be continued, amended, or repealed. They were again revived on the 13th of March 1772.

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ing a free trade in the said commodities, have a tendency to discourage the growth and enhance the price, a mode of reasoning which strikes at the whole system of these laws, then proceeds to repeal several leading statutes by name, amongst others that of the 5 & 6 Ed. 6. c. 14., which was supposed to be declaratory of the common law itself, and all acts made for the better enforcement of the same; being, as the legislature say, detrimental to the supply of the labouring and manufacturing poor of the kingdom. The legislature then did not consider the practices against which these laws were made as the evil, but that the laws themselves were so. They state that the restraints laid by these statutes were detrimental to free trade, and to the supply of the poor. It is clear therefore that by the repeal of the stat. 5 & 6 Ed. 6. they concluded that they were repealing not merely the letter but the spirit of the law: For otherwise it was nugatory to repeal a statute taken to be declaratory of the common law, if the same restraint were to prevail after the repeal of the law as before. And according to *Hardr.* 208. which cites various passages from *Plowden*, that which is taken to be within the intent of an act, which the Judges are sometimes to collect from the occasion and necessity of enacting it, is equivalent to what is within the express words. This was so considered in a case of *Williams q. t. v. Watkins* in 1797, before Lord Chief Justice *Eyre* in C. B., which was an action for penalties on the stat. 25 Ed. 3. st. 4. c. 3. (an act not mentioned by name at least in the repealing act of the 12 Geo. 3.) for forestalling cattle coming to *Smithfield* market. His Lordship however said it was his opinion, and had been so considered by many learned men, that all the laws relative to forestalling, &c. were repealed, as well those which were omitted as those specially included in the

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act of the 12 Geo. 3.: and that if the plaintiff's counsel thought otherwise, he would suffer a verdict to be taken for the plaintiff in order that the opinion of the court might be had upon the subject: but there was no resistance to his Lordship's opinion, and the plaintiff was nonsuited. (*Le Blanc* J. said, he did not know under what particular circumstances that case passed; but to his own knowledge there were several other *qui tam* actions upon statutes of this description which were not included in the repealing act of the 12 Geo. 3., upon which recoveries were had upon trials before the same learned Judge; which shewed that it was not his opinion that all the laws in *pari materia*, though not named in the repealing act, were by implication repealed. And therefore there was probably something else in the case alluded to than what the note purported.)

The defendant's counsel then took objections to the particular form of the counts. As to the first and second counts, charging the defendant with having spread rumours to enhance the price of hops, the rumours are not stated to be *false*, which is essential to the offence. In 43 *Aff. pl.* 38. it is laid to be *in deceit of the people*. *Bro. Indictment, pl.* 40. *Presentment, pl.* 12. It is true that Lord Coke in the 3 *Inst.* 195, 6. describes the offence without that qualification; but the omission is supplied in express terms by Serjt. Hawkins in the 1 *vol. P. C. c.* 80. *f.* 1., who states the offence to be the endeavouring to enhance the common price of any merchandise, and gives as an instance, the spreading of *false* rumours. At least therefore it should have been stated, that in fact the price of the commodity had been raised by means of such rumours. As to the third count, (which applies also to the two first,) it is not stated that the persons whom the defendant endeavoured

voured to persuade not to bring their hops to market for sale, were persons bringing or about to bring their hops to market. In *Hook's case* (a) an indictment for forestalling was quashed for this defect; which by a parity of reasoning applies equally to this case. As to the fourth and subsequent counts for engrossing, it is not stated that the defendant bought the hops for the purpose of re-selling them in gross, without which there is no offence. The policy of the law in this respect was to prevent persons buying up large quantities in order to sell again in large quantities, which necessarily tends to enhance the price of the commodity. And this agrees with what is said in 3 *Inst.* 196. 1 *Hawk. P. C. c.* 80. *f.* 3. and 4 *Com. Dig.* 68., but it never was nor can be deemed an offence to buy in gross for the purpose of selling again in retail, which for aught appears was the defendant's intention; although the price of the commodity must from the nature of the thing be thereby increased; for the individual consumer cannot be served in any other manner. It is true that the lastmentioned author says, that an indictment for buying *ea intentione ad revendendum* is sufficient, and that after verdict it shall not be intended of a re-selling by retail: but the authorities cited by him of *Cro. Car.* 315. and *Jones* 320. do not warrant the position: for the objection was not that the defendant might, for aught appearing to the contrary, have sold again by retail, but that he might have sold again at reasonable prices, and so no engrossing, which was the objection over-ruled. Besides, there is no quantity specified on the face of the information, out of which the defendant purchased the number of pockets of hops charged therein, which ought to have ap-

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(a) 1 *Roll. Rep.* 421.

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peared. For engrossing is a relative term, and must mean getting either the whole of any commodity, or at least so much of it as to prevent others from supplying their wants in the common course of trade. Now here, in fact, the defendant did not purchase above a fifth part of the existing commodity at a single place, (*Worcester*,) viz. 1000 out of 5000 pockets; whereas the quantity engrossed ought to be so much as will affect the consumption of the whole kingdom. (Lord *Kenyon* C. J. That is a question of fact which the jury have decided against the defendant. *Le Blanc* J. May not several persons be guilty of engrossing at the same time, though without any connexion with each other; whose dealings altogether may affect the general consumption? And yet the same answer might be given to each case.)

Erskine, Garrow, Gibbs, Milles, Manley, Scott, W. Jackson, and Harrison, for the prosecution. It is clear from the opinion of Lord *Coke* in 3 *Inst.* 195. and from all other general writers, that forestalling, engrossing, and regrating, were crimes at common law, and not created for the first time by the stat. 5 & 6 *Ed. 6. c. 14.*; and indeed the statute itself speaks of them as offences known before. And therefore when that and other statutes by name were repealed by the stat. 12 *Geo. 3. c. 71.* it left the common law untouched, and only took away the particular penalties superadded thereto. If the statute of *Geo. 3.* had been intended to take away the common law, it is more natural to suppose that it would have declared so in terms, or at least it would have been conceived in more general words of repeal. On the contrary, it is confined to the repeal of particular statutes enumerated, and omits several other statutes passed in *pari materia*, which it appears have been put

put in ure since the 12 *Geo.* 3. One of these is the stat. 15 *Car.* 2. c. 7. which prohibited the buying of corn to sell again, and the laying it up in granaries when it was above a certain price; which the legislature themselves have recognized as an existing statute since that period, having expressly repealed it by a late statute, the 31 *Geo.* 3. c. 30. s. 2. The reason why so little is to be found in the books concerning the common law upon this subject is, because from so early a period as the 5 & 6 *Ed.* 6. prosecutions for offences of this nature were framed with more facility and certainty upon the statute passed at that time. It is immaterial to consider whether hops be a *viſtual* or not, (although since the stat. 9 *Anne*, c. 12. s. 24. made it a necessary ingredient in beer, there can be no doubt that it must be now so considered, even if general use had not before made it so;) for the common law offences charged in the three first counts extend as well to practices to enhance the price of any other merchandise as of viſtuals. With respect to the quantity engrossed, it was not necessary to specify particularly the relative proportions. The offence itself consists in buying up indefinite large quantities of a commodity for the purpose of re-selling it at an unreasonable profit, and thereby to enhance the price at market. This may be done in a variety of ways; there may be an ingrossing, whether the quantity be more or less; that must depend upon circumstances of which the jury alone can judge, and they have found the fact against the defendant. But the offence is of a larger and more general description than the argument for the defendant assumes it to be; for any sort of practice, of which several are stated in the information, done with intent to raise the price of a commodity in a public market, is of itself a misdemeanor at common law, being an attempt highly immoral, and at-

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tended with great public mischief. The spreading rumours whether true or false, if done with a mischievous intent to procure a public detriment, is indictable upon general principles of law; in the same manner as publishing a libel, however true the facts stated may be. So in Mr. *Jolliffe's* case (a), he was charged in a criminal information with endeavouring to procure an appointment of certain persons to be overseers; an act indifferent in itself; but the criminality lay in the intent, which was charged to be in order to derive a private advantage to himself from such appointment. And there it was not stated that the appointment was actually made. At any rate, if the truth of the rumours here were matter of justification, it lay upon the defendant to prove it in his defence, to whom it must be best known, and forms no part of the charge in the first instance.

LORD KENYON C. J. then said, that the Court would take into consideration the particular objections which had been made to the information; but for the present he would deliver the opinion which he had formed upon the general question; which he did in substance as follows: Notwithstanding the turn which the arguments have taken, and though in form there is no motion in arrest of judgment regularly before the Court, yet it is very evident that the whole range of the law upon this subject has been ransacked, and every case bearing in any degree upon the subject has been brought forward. This is a most momentous question, and it well behoves us to be sure of every step we take. Whatever measures the legislature in their wisdom may think proper to adopt, in order as far as

(a) See 4 *Term Rep.* 285. where this information is alluded to.

possible to alleviate the present pressure, and prevent its recurrence; we in the mean time must act upon the law as it is; such as we find it transmitted to us by the most reverend sages of the law. It has been said, that if practices such as those with which this defendant stands charged are to be deemed criminal and punishable, the metropolis would be starved, as it could not be supplied by any other means. I by no means subscribe to that position. I know not whether it be supplied from day to day, from week to week, or how otherwise; but this is to me most evident, that in whatever manner the supply is made, if a number of rich persons are to buy up the whole or a considerable part of the produce from whence such supply is derived, in order to make their own private and exorbitant advantage of it to the public detriment, it will be found to be an evil of the greatest magnitude; and I am warranted in saying, that it is a most heinous offence against religion and morality, and against the established law of the country. That our law books do declare practices of the sort with which the defendant is charged to be offences at common law cannot be denied. But it has been argued that the stat. of *Ed. 6. (a)* against regrators, forestallers, and engrossers, having declared what the common law was, and it having been determined that hops were not a victual within that act, therefore the engrossing of hops was never an offence at common law, not being considered as a necessary of life. But it is not difficult to expose the fallacy of such reasoning as applied to the times in which we live. When fairly considered, no two cases can be more unlike. It was not long before that determination was made that hops were considered

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as a noxious weed, and consequently could not, under such circumstances, be considered as falling within the meaning of the law. But times went on, and things changed; what was formerly considered as poisonous is now become a common necessary of life. This instance is not singular; broom was formerly used as a bitter, which is now exploded. And it is but lately that the county of Kent was up in arms against the brewers for introducing quassia instead of hops into their beer, alleging its detrimental qualities to the health of the public, although we find it introduced into the materia medica as a salutary bitter, approved by the whole College of Physicians. So times and opinions alter. When hops were not a victual they were declared not to be within the scope of the law against monopolies; since they have become such they fall under a different consideration. Then it is urged with greater refinement, that, though in common use and necessary, they are not themselves a victual, but only a preservative of victual. But how does that objection agree with the determination respecting salt? The same thing might be said of this latter, and yet salt was holden to be a victual within the law against engrossing. Again, it is urged that the quantity purchased cannot constitute the offence of engrossing, unless it bear such a proportion to the consumption of the whole kingdom as will affect the general price. This objection is new to me; but if the opinions of Lord *Mansfield*, Mr. Justice *Dennis*, and Mr. Justice *Foster* are deserving of attention, there is as little in that objection as in the rest. I well remember an information moved for before them against certain persons for conspiring to monopolize or raise the price of all the salt at Droitwich. They had no doubt of its constituting an offence, although it was not pretended that

that these persons had endeavoured to engross all or any considerable part of the salt in the kingdom. Now was it questioned but that the monopolizing of salt was an offence at common law. If, then, hops are become a necessary ingredient, though only for preserving the common drink of the people, they must be deemed a necessary of life and a victual, the engrossing of which, or committing any undue practices to enhance the price to the public, is an offence at common law. So far as the policy of this system of laws has been lately called in question, I have endeavoured to inform myself as much as lay in my power, and for this purpose I have read Dr. *Adam Smith's* work (a), and various other publications upon the same subject, though with different views of it; amongst others, one addressed to Lord *Spencer* which is written in a superior style to most of the others. I do not profess to be a competent judge in this conflict of political opinion; though I cannot help observing, that many of those who have written in support of our ancient system of jurisprudence, the growth of the wisdom of man for so many ages, are not as they are alleged by some to be men writing from their closets without any knowledge of the affairs of life, but persons mixing with the mass of society, and capable of receiving practical experience of the soundness of the maxims they inculcate. But without attending to disputed points, let us state fairly what this case really is, and then see if it be possible to doubt whether the defendant has been guilty of any offence. Here is a person going into the market who deals in a certain commodity. If he went there for the purpose of making his purchases in the fair course of

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dealing with a view of afterwards dispersing the commodity which he collected in proportion to the wants and convenience of the public, whatever profit accrues to him from the transaction, no blame is imputable to him. On the contrary, if the "whole of his conduct shews plainly that he did not make his purchases in the market with this view, but that his traffic there was carried on with a view to enhance the price of the commodity; to deprive the people of their ordinary subsistence, or else to compel them to purchase it at an exorbitant price; who can deny that this is an offence of the greatest magnitude? It was the peculiar policy of this system of laws to provide for the wants of the poor labouring class of the country. If humanity alone cannot operate to this end, interest and policy must compel our attention to it. Now this defendant went into the market for the very purpose of tempting the dealers in hops to raise the price of the article, offering them higher terms than they themselves proposed and were contented to take, and urging them to withhold their hops from the market in order to compel the public to pay a higher price. What defence can be made for such conduct? and how is it possible to impute an innocent intention to him? We must judge of a man's motives from his overt acts; and by that rule it cannot be said that the defendant's conduct was fair and honest to the public. It is our duty to take care that persons in pursuing their own particular interests do not transgress those laws which were made for the benefit of the whole community. I am perfectly satisfied that the common law remains in force with respect to offences of this nature; and in considering whether that was intended to be done away by the act of the 12 Geo. 3., I cannot regard the resolutions entered on the Journals of the Com-

mons House of Parliament, but must look to the statute-book ; and there I find nothing which trenches upon what I have said, but only a repeal of certain statutes, upon none of which is this prosecution founded, but upon the common law. I have said thus much, which occurred to me, at present : but I shall consult with my brethren, and the case shall be fully considered upon all the objections which have been made before judgment is pronounced,

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A question then arose, Whether the defendant should stand committed, the prosecutor's counsel saying they should not interfere, but let the usual course take place ; and the defendant's counsel praying he might be bailed ? But Lord *Kenyon* said, that unless the prosecutor consented to the defendant's remaining out on bail, it was a matter absolutely of course that he should be committed : the Court had no discretion to exercise, and the practice was too well settled to admit of argument.

Defendant committed pending the consideration of the judgment.

On the last day of last term (a),

Lord KENYON C. J. said, that though the defendant had waved making any motion in arrest of judgment, yet doubts having been thrown out concerning the nature of the offence imputed to him, it was essential to the ends of justice that the Court should take them into their serious consideration, as well with respect to the propriety of granting a new trial if the information were not sustained by the evidence, as whether any judgment ought to be given against the defendant on the information itself ; and they were clearly satisfied that there was no ground either for a new trial or in arrest of judgment. That they

(a) *Lawrence J.* was absent from indisposition at this time, as well as on the prior day in the term, when the case was argued at the bar.

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should take time to consider till the next term what sentence was proper to be pronounced; but that the defendant should not suffer from the delay, as whatever imprisonment he suffered in the mean time would be taken into the account when sentence was passed. For the present he must stand committed till the fifth day of the next term.

Accordingly on this day the defendant being brought up to receive the judgment of the Court,

GROSE J. in passing sentence delivered their opinion upon the particular case to this effect. The defendant has been found guilty upon an information charging him with having put in practice divers methods specified in the several counts, for the purpose of enhancing the price of hops. It appears from the evidence, that he being a merchant living in a distant county, (the county of *Kent*,) in the months of *March* and *April* last went to the city of *Worcester*, where was held a considerable market for hops. That upon his arrival there the state of the market was, to use the expression of one of the witnesses and which is intelligible, *very slack*: that the stock of hops in that county was then very considerably more than sufficient to answer the current demand; and that there was then a prospect of their being lower. The price in the *January* preceding had been between 15*l.* and 16*l.* per cwt., the market price in *March* was from 11*l.* to 13*l.* per cwt.; so low that the defendant thought fit to observe upon it, and state publicly in the market, which was very full, that the low price of hops was owing to a prosecution instituted against him. It appears that he then assured the by-standers, whether truly or not he best knew, that the prosecution against him was dropped, and that of course

course hops must rise again. Nothing however of that sort was proved; and therefore the ground of the assertion, that hops would of course rise again, seems to have been not perfectly correct. He then further asserted, that the stock of hops in the hands of the brewers was nearly exhausted; (an assertion for which there did not appear any foundation;) and further, that very soon they must come to him or to the hop-planters for hops; that hops would be at 20*l.* per cwt.; and that the hop-planters might depend on his assistance to keep them up. From thence it appears that the defendant had a stock of hops in hand; and that it was his intention not only to keep up the price in his own dealings, but to assist others in doing the like, until that commodity which was then between 11*l.* and 13*l.* per cwt. should rise to 20*l.* per cwt. To effect this he entered into contracts to purchase 200 pockets at 12*l.* 10*s.* per cwt. that day, and 200 pockets each succeeding market, advancing each market till the price should arrive at 15*l.* per cwt.; and so become a purchaser of one fifth of the produce of *Worcestershire* and *Herefordshire* at a much higher price than that at which hops were when he arrived at *Worcester*. In the present state of what is called paper credit, human ingenuity could not invent a more certain mode of enhancing the price of a commodity. And at the same time he urged the dealers in hops either not to bring them to market, or if they did, not to sell them at a less price than he offered to give, which was greater than any price asked on that day. This was done in an extensive market at *Worcester*, from whence, as it appeared, the northern markets principally received their supply. The consequences of such conduct might be easily foreseen, and were soon felt: hops which had been offered to be delivered on a day in *May* at 13*l.* per cwt. were on the same

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same day sold at 15*l.*; and so the market continued to vary to the end of *June*. The sum then of the offence is, that the defendant, a merchant of credit and affluence in *Kent*, having a stock of hops in hand, went to the market at *Worcester*, not to buy hops, for that he disclaimed, nor to sell them, for upon the evidence it does not appear that he offered any for sale, but merely to speculate how he could enhance the price of that commodity. And for that purpose he declared to the sellers that hops were too cheap, and to the hop-planters that they had not a fair price for their hops: and lest he should be defeated in his speculation to raise the price of a falling market, he contracted for one fifth of the produce of two counties, when he had a stock in hand, and admitted that he did not want to purchase.

Upon this state of the case, however, it has been argued that no sentence ought to be pronounced, or if any, it should be a light one. As to the first point, that no sentence ought to be passed, or that judgment ought to be arrested, an answer has already been given; although whatever our opinion then was, if the court had felt that in justice to the defendant and to the public no judgment against him ought to be given, we should not hesitate to say so. When however we recollect the anxiety shewn by our ancestors to prevent the commission of this class of offences; and when we recollect what the common law as handed down to us by our ablest reporters and commentators upon this subject is; we cannot but deem that it would be a precedent of most awful moment for this court to declare, that hops, which are an article of merchandize, and which we are compelled to use for the preservation of the common beverage of the people of this country, are not an article the price of which it is a crime by

by undue means to enhance ; or that the stat. 12 *Geo.* 3. c. 71. which expressly repeals certain specified statutes, was intended to repeal other statutes not specified, and to repeal that which the common law of the land has ordained for the protection of the poor, in preventing the advancing of the price of those commodities without which they cannot exist.

In mitigation of punishment the Court has been repeatedly and strongly addressed upon the freedom of trade ; as if it were requisite to support the freedom of trade that one man shall be permitted for his own private emolument to enhance the price of commodities become necessities of life, and thereby possibly prevent a large portion of his majesty's subjects from purchasing those necessities at all. The freedom of trade, like the liberty of the press, is one thing ; the abuse of that freedom, like the licentiousness of the press, is another. God forbid that this court should do any thing that should interfere with the legal freedom of trade. In support of it the law has declared, and that law has repeatedly been acted upon, that to violate the freedom of trade by intercepting commodities in their way to market, taking them from the owner by force, or, which is the same thing, obliging him to accept a less price than he demands, and carrying them away against his will, or committing the like violation upon him in the market, is a capital offence, for which men have forfeited their lives to the law : for the law so far protects the freedom of trade as to encourage men to bring their goods to market, by punishing those who by acts of violence deter others from so doing. But the same law that protects the proprietors of merchandize takes an interest also in the concerns of the public, by protecting the poor man against the avarice of the rich ;
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and from all time it has been an offence against the public to commit practices to enhance the price of merchandize coming to market, particularly the necessaries of life, for the purpose of enriching an individual. The freedom of trade has its legal limits. No man under that liberty is permitted to dispose of his riches, in purchasing what, and of whom he pleases, nor when, or where he pleases. It is notorious that there are certain goods which are contraband, which no man can by law trade in; there are other goods which none but persons specially authorized by the law can trade in; there are places to which none but persons authorized by law can resort for the purpose of trade; and there are persons with whom no trade can legally be carried on. I allude to the trade carried on by the *East India Company*; to naval stores marked with the king's marks; to commerce with an enemy. For the sake of the public, and especially of the poor, part of his majesty's subjects, the law pays particular respect to the necessaries of life; the price of which a man is not permitted to enhance by undue means for his own private profit. In these and other respects the freedom of trade has its limits, and is and must, like all our other liberties, be regulated by law. That law, for the protection of those who are obliged to resort to market for the purpose of purchasing, we are bound to administer, as well as that which exists to protect those who resort to market for the purpose of selling. Looking into our books, we find that the commission of the offence stated in the information is a crime entitled to the serious attention of a court of justice, and that we are bound to treat it as such.

But it is urged that the defendant, knowing that the statutes of the 3 & 4 Ed. 6, and 5 & 6 of the same reign, and

and other subsequent statutes were repealed by the stat. 12 Geo. 3. c. 71. supposed that engrossing, forestalling, regrating, and every other offence by which men attempt wilfully and unnecessarily to enhance the price of necessities of life and other merchandizes ceased to be offences in the eye of the law. This argument supposes him to have read that statute, and those which it repealed; and either to have considered the several laws upon the subject, or advised with others who have had a better opportunity so to do. Supposing him to have done this, the answer is, that that statute, of which he claims the benefit, does not apply to his case. That statute does not say that such acts as this defendant has committed shall cease to be criminal. The effect of it only is, that for the commission of certain crimes specified in certain statutes (which are declaratory statutes, and consider the crimes therein mentioned as crimes at common law,) a man shall not be liable to certain penalties and punishments specified in those statutes. But this may be considered as the answer of men bred to the law. A better answer is, that this information is not exhibited for any offence contained in the statutes repealed. That the offence of which the defendant has been convicted is a direct violation of the rules of just and honourable trade, which encourages every one to bring his goods to market and dispose of them to the best bidder. That the defendant has been guilty of using the undue means stated in the information for the purpose of obtaining an excessive and exorbitant price, higher than any that was demanded at the market, which he attended, for the commodity in which he dealt; by which means a temporary fictitious scarcity was likely to be produced, and the price of the commodity unnecessarily and unreasonably raised upon the

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public. And in truth it must have occurred to any person considering the effect of the statute 12 Geo. 3. how improbable if not impossible it was that the legislature of a great and populous kingdom, ever anxious to provide for the most necessitous objects in it, should have intended by this statute to have taken from the lower and middling classes of men that security against the unnecessary high price of provisions, which the common law intended to give them; and not only to open a door, but throw out a temptation to rich men to speculate upon the price of the necessaries of life at the risk and expence of the poor. Any argument therefore derived from the defendant's consideration of the statute of Geo. 3., if duly considered, can operate little in mitigation of his sentence; especially when it is recollected that his attention to and conduct on the subject were awakened by the first application against him in this court, and that subsequent to it, in neglect at least if not in defiance of the consequences, the facts on which this prosecution is founded were committed.

The Court having taken into consideration the nature and extent of the offence, and the time at which it was committed, when a punishment is peculiarly called for that may operate as an example to prevent others committing the like crime which so materially concerns all classes of men, at the same time having respect to the imprisonment the defendant has already suffered, do order and adjudge that he pay to the King a fine of 500*l.*, and be further imprisoned in the prison of this court for one month, and until that fine be paid.

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The KING *against* WADDINGTON (a).

Wednesday,
Feb. 11th.

THE defendant was tried before Lord *Kenyon* and convicted generally on another indictment, the first count of which charged that he on the 20th of *September* 1799, at *Maidstone* in the county of *Kent* did engross and get into his hands by buying on divers days and times between the 20th of *September* 1798 and the 1st of *January* 1800, divers large quantities of hops, to wit, of one *T. W.* a certain large quantity of hops, to wit, 500 wt. of hops, (and so of twenty-five other persons by name other quantities) with intent and design to re-sell the said hops so by him engrossed and bought as aforesaid for an unreasonable profit, and thereby greatly to enhance the price of hops, to the evil example, &c. and against the peace, &c.

Offences at common law.

1. Engrossing hops of divers persons by name, with intent to re-sell at an unreasonable profit, and thereby enhance the price;

2d, That the defendant on the 10th of *November* 1799, at *Maidstone*, &c. did engross and get into his hands a large quantity (to wit) fifty acres of hops before that time planted and then growing on certain lands of one *J. A.* by a certain forehand bargain, that is to say, by contracting with the said *J. A.* to buy and take of him the said *J. A.*, and by persuading and procuring the said *J. A.* to contract to sell and deliver to him the said defendant at a certain large price, to wit, at the price of 10*l.* for each and every hundred weight of all the hops that should be grown by the said *J. A.* upon certain lands situate in the parish of *St. Paul* in the said county in possession of the said *J. A.*, then planted with hops by the said *J. A.*, with intent and design to re-sell the hops thereof coming, and

2. Engrossing hops then growing by forehand bargains, with like intent.

(a) See the last case.

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3. Buying large quantities of hops of divers persons mentioned, with intent to prevent their being brought to market, and to re-sell them at an unreasonable profit, and thereby enhance the price.

4. Buying all the growth of hops in several parishes by forehand bargains, with the like intent.

5. Buying hops of divers persons named, with the same intent as in the first count.

6. Buying all the growth of hops on certain lands in certain parishes by forehand bargains, with intent to re-sell at unreasonable price and enhance price.

every part and parcel thereof engrossed and bought as aforesaid, for an unreasonable profit, and thereby greatly to enhance the price of hops, to the evil example, &c. and against the peace, &c.

3^d, That the defendant on divers days, &c. at, &c. did buy and cause to be bought, and did get into his hands a certain large quantity of hops by buying of one *T. W.* (and 27 others named therein) certain large quantities of hops (also specified) with intent to prevent the same from being brought to market for sale, and to re-sell the same for an unreasonable profit, and thereby greatly to enhance the price of hops, in contempt, &c.

4th, That defendant bought all the growth of hops on divers acres of land situate in the several parishes (named) by certain forehand bargains, viz. by bargaining with one *T. S.* (and 38 others named) to buy all the hops then growing or that should be growing in the then next season on certain lands in the said several and respective parishes (named) at a certain large price, viz. at the rate of 10*l.* for every hundred weight, &c. with the like intent as in the last count.

5th, That the defendant bought and got into his hands by buying of *T. W.* (and 27 other persons named) a certain large quantity of hops (therein mentioned) with intent to re-sell the same for an unreasonable profit, and thereby greatly to enhance the price of hops.

6th, That the defendant bought all the growth of hops upon divers acres of land situate in the several parishes (named) by certain forehand bargains, viz. by bargaining with *T. S.* (and 38 others named) at a certain large price, viz. 10*l.* for every hundred weight of the hops then grown or that should be grown in the next season upon the said lands, with intent to re-sell the hops thereof coming

for

for an unreasonable price, and thereby greatly to enhance the price, &c.

7th, That the defendant unlawfully endeavoured to promote and enhance the price of hops, by persuading and attempting to persuade divers persons dealing in hops and accustomed to sell hops, and having large quantities of hops for sale, not to go to any market or fair with any hops for sale, and to abstain from selling such hops for a long time, in contempt, &c.

8th, That defendant between the 2d of September 1798 and the 1st of May 1800 did unlawfully ingross and get into his hands by buying of divers persons unknown divers quantities amounting to 2000 tons of hops, with intent to re-sell the same at an exorbitant profit, and thereby greatly to enhance the price of hops.

The 9th Count was the same as the last, only omitting the charge of *engrossing*, and confining it to a *buying*.

10th, That the defendant at the said times bought of divers persons unknown the growth of divers, viz. 2000 acres of hops then growing upon 2000 acres of land situate in the several parishes (named) at a large price, viz. at the rate of 10/. for every hundred weight of hops that should be grown upon the said land, with intent to re-sell the hops thereof coming for an exorbitant price and lucre, and thereby greatly to enhance the price of hops, to the evil example, &c. and against the peace, &c.

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7. Endeavouring to enhance the price of hops by persuading hop owners not to sell, &c.

8. Engrossing by buying large quantities of persons unknown, with intent to re-sell at an exorbitant profit, &c.

9. Buying large quantities with like intent.

10. Buying hops then growing, with intent to re-sell at an exorbitant price and lucre.

Lord KENYON C. J. reported the evidence given at the trial, which in his judgment was sufficient to go to the jury upon all the counts; and that they found a general verdict against the defendant. The principal part of the evidence related to the forehand bargains made by the defendant with different planters for their growing crop of hops; a practice

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however which appeared to have prevailed for a considerable period of time in *Kent*, and without which some of the witnesses stated that in their judgment the cultivation of this plant, the expence of which was exceedingly heavy, could not be generally carried on. There was also evidence of the defendant's having bought up very large quantities of the commodity to an unusual amount, and by making unusual advances of money; and that he had held out language of inducement to other persons dealing in the same article to withhold their stock from the market with a view to a rise in the price. This last-mentioned evidence applied to the 7th count, the only one the proof of which was afterwards contested at the bar, but without effect.

The defendant's counsel, by his desire in this as in the former case, disclaimed moving in arrest of judgment or for a new trial; and as the general turn of the arguments were similar to those before urged, it is not necessary to detail them, but only to notice the new matter.

Law, Bond, Wood, Dauncry, Clifford, and Peake, for the defendant, observed, that the long existence of the practice of making forehand bargains for hops was in itself some argument for their legality; more especially as many actions have been brought in the shape of actions on wagers for damages founded on the breach of such contracts, or to compel their execution. This too is aided by the consideration that without the help of these bargains men of moderate capital by whom the market must be generally supplied could not incur the heavy expence of cultivating this plant. The stat. 5 & 6 Ed. 6. c. 14. s. 3. only prohibits the purchase of growing corn; and there-

fore

fore it may be presumed that the offence of engrossing at common law by making such bargains was confined to grain alone: and the only instance mentioned of a judgment against any one for what may be considered as a forehand bargain is *Hadbam's* case in 3 *Inst.* 197. which was the case of a sale of corn in the sheaf before it was threshed and measured. But that was because the article sold was otherwise than by measure, which is the proper and usual method of selling corn; whereas Hops are sold by weight, in which there can be no deceit. At any rate it cannot be considered as ingrossing to have made forehand bargains for 258 acres out of 30,000 acres in cultivation of the same article in the county of *Kent* alone. And if such bargains be not illegal, they cannot be laid or given in proof as the means to carry into effect an illegal intent. They also mentioned several statutes and cases to shew that hops were in use and the growth encouraged long prior to the case in 20 *Jac.* 1. (a), where hops were resolved by all the Judges not to be a victual within the stat. 5 & 6 *Ed.* 6. c. 14. viz. the 5 & 6 *Ed.* 6. c. 5. 5 *Eliz.* c. 2. 39 *Eliz.* c. 1, 2. 1 *Jac.* 1. c. 18. A case in 3 *Jac.* 1. *Hutt.* 78. *Barham v. Goose*, *Hil.* 14 *Jac.* 1. 2 *Darro. Abr.* 596. pl. 3. Also so far back as the 6 *Hen.* 6. there was a petition in parliament against the use of hops.

Erskine, Garrow, Gibbs, Scott, and Harrison, in support of the prosecution, said that the substance of the offence with which the defendant was charged in all but the 7th count, was the ingrossing a large quantity of hops by buying them from various persons by forehand bargains and

(a) Vide ante in the last case, p. 147.

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otherwise at a certain price with intent to re-sell them at an unreasonable profit or an exorbitant price. This in it's nature is like the offence of monopolizing (a), which has never been denied to be highly criminal at common law, tending to the destruction of trade and to the enhancing of the price of commodities to the public. It would be absurd to suppose that this power which has been denied to the Crown should be considered as a lawful practice in an individual. For before the stat. 21 Jac. 1. c. 3. the procuring licences from the Crown for a monopoly was an offence at common law. ; *Inff.* 181.

GROSE J. now passed sentence upon the defendant ; adverting to what he had before said upon the first indictment ; and that it now appeared that the defendant had carried on these practices to a much greater extent ; and that the particular offence of engrossing, which still remained an offence at common law, was calculated to create an artificial scarcity where none existed in reality, and to aggravate that calamity where it did exist. The defendant was therefore adjudged for this offence to pay a fine to the King of 500*l.*, and to be further imprisoned in the prison of this Court for three months, to be computed after the expiration of his former imprisonment, and further until the fine were paid.

(a) *Vide Skm.* 169.

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The KING *against* MICAH GIBBS.Wednesday,
Jan. 28th.

AN indictment was preferred and found against the defendant at the General Quarter Sessions of the Peace for the county of *Somerset*; the first count of which charged that he being a person assessed to certain duties granted by an act passed in the 39 *Geo. 3.* (c. 13.), intituled, "An act to repeal the duties imposed by an act made in the last session of parliament for granting an aid and contribution for the prosecution of the war, and to make more effectual provision for the like purpose, by granting certain duties upon income in lieu of the said duties," by *E. R.*, *J. L.*, and *S. D.* Esquires, commissioners for the purposes of the said last-mentioned act; and of another act passed in the same year (c. 22.), intituled "An act for extending the time for returning statements under an act, &c. (viz. the former act), and to amend the said act;" and of another act passed in the same year (c. 42.), intituled "An act to enable the commercial commissioners, appointed to carry into execution certain acts for granting duties upon income, to extend the time limited by the said acts for receiving returns of income, and for explaining and amending the said acts;" and acting in and for the division of *Bath forum* in the said county, and duly authorized in that behalf; and under pretence of thinking himself aggrieved by the said assessment; did afterwards, to wit, on the 19th of *June* 1799, at, &c. appeal from the said assessment to Sir *A. E.*, *P. S.*, and *J. M. R.* being commissioners duly appointed to hear and determine appeals relating to the said duties on income in and for the eastern

The Sessions have no jurisdiction over the offence of forgery at common law, nor can they take cognizance of it as a cheat.

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district of the said county; and afterwards, to wit, on, &c. at, &c. did appear before the said last-mentioned commissioners and prosecute his said appeal; and the defendant wickedly contriving and intending to deceive the said commissioners of appeal, and to induce them to believe that the particulars of his income and of the deductions claimed by him from the amount of such income had been inquired into, examined, and approved by one *Richard Elfe*, then and there being clerk to the said commissioners by whom the said assessment had been made; and with an iniquitous and fraudulent intention to give effect to his said appeal, and to evade being finally assessed to the full amount of the duties with which he was chargeable in respect of his income, and to defraud his majesty of certain duties justly chargeable upon the income of the said defendant; on, &c. at, &c. with force and arms, at the bottom of a certain piece of paper, purporting to be a schedule of the particulars of the income of the said defendant, did wickedly subscribe and falsely forge and counterfeit and cause to be falsely forged and counterfeited the letters and initials following; that is to say, the letters *R. E.* purporting to be the initials of the name of the said *Richard Elfe*, then and there being clerk to the said first-mentioned commissioners, and to be written by the said *Richard Elfe*; and did, in further prosecution of his iniquitous intention aforesaid, then and there produce and exhibit to the said commissioners of appeal the said piece of paper with the said letters and initials so falsely forged and counterfeited thereon, as aforesaid, in contempt, &c. and against the peace, &c.

The second count was the same as the first, except that it charged that the defendant, intending to induce the commissioners of appeal to believe that *certain particulars*
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of his income and of *certain* deductions claimed by him thereupon, had been *examined* by the said *Rd. Elfe*, (not stating who *Rd. Elfe* was,) and with an iniquitous and fraudulent intention to give effect to his said appeal, and to evade the being finally assessed to the full amount of the duties with which he was chargeable in respect of his income, and to defraud his majesty of certain duties justly chargeable upon the income of the said *Micah Gibbs*, on, &c. at, &c. with force and arms a certain piece of paper, purporting to be a schedule of the particulars of income of the defendant, whereon were falsely forged and counterfeited the letters and initials following; that is to say, the letters *R. E.* purporting to be the initials of the name of the said *Richard Elfe*, then and there being clerk to the commissioners for the purpose of the said acts, and to be written by him the said *Richard Elfe*, did wickedly, unlawfully, and fraudulently publish and cause to be published, and did in further prosecution of his iniquitous intentions aforesaid then and there produce and exhibit to the said commissioners of appeal the said piece of paper, with the said letters and initials so falsely forged and counterfeited thereon as aforesaid, he the defendant then and there well knowing the said letters and initials so published as aforesaid to be false, forged, and counterfeited, in contempt, &c. and against the peace, &c.

The third count charged that the defendant, being a person assessed to certain duties granted by an act passed in the 39 *Geo. 3. (c. 13.)*, intitled, &c. and having appealed against the assessment made upon him to the said duties, he the said defendant wickedly contriving and intending to deceive certain commissioners before and by whom such appeal was to be heard and determined, in pursuance of
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the acts in such case made and provided, and with an iniquitous and fraudulent intention to induce the commissioners, by whom such appeal was to be heard and determined in pursuance of the acts in such case provided, to believe that the particulars of the income of the said defendant, and of the deductions claimed by him from the amount of such income, had been inquired into and examined by one *Rd. Elfe*, then and there being clerk to the commissioners by whom such assessments had been made, and with an iniquitous intention to give effect to the said appeal, and to evade the being finally assessed to the full amount of the duties chargeable upon him in respect of his income, afterwards, to wit, on, &c. at, &c. with force and arms, upon a certain piece of paper purporting to contain the particulars of the income of him the said defendant, and of the deductions therefrom, did wickedly subscribe and falsely forge and counterfeit the letters and initials following, (viz.) the letters *R. E.* purporting to be the initials of the name of the said *Rd. Elfe*, in contempt, &c. and against the peace, &c.

The fourth count charged that the defendant being assessed to certain duties granted by an act passed in the 39 *Geo. 3.* (c. 13.), intitled, &c. and thinking himself aggrieved thereby, and having appealed therefrom, he the defendant wickedly contriving and iniquitously intending to cause the amount of the assessment made upon him to be diminished, without any just cause, afterwards, to wit, on, &c. at, &c. with force and arms, a certain other piece of paper, purporting to contain the particulars of his income, and of the deductions by him claimed to be made thereon, at the bottom of which said paper were falsely forged and counterfeited the initials of the name of the said *Richard Elfe*,

Elfe, then and there being clerk to certain commissioners by whom the assessment had been made on the said defendant, did wickedly, unlawfully, and fraudulently publish and cause to be published, he the defendant then and before well knowing the said letters *R. E.* at the bottom of the said piece of paper so published as aforesaid to be false, forged, and counterfeited, in contempt, &c. and against the peace, &c.

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To this indictment the defendant pleaded not guilty, and at the sessions holden for the said county on the 8th *October* 1800 was found guilty, and judgment was given by that Court, that for the offences specified in the indictment he should be fined 200 *l.* and be imprisoned for six calendar months and until such fine should be paid. In *Michaelmas* term last the defendant brought a writ of error, and assigned the common errors.

Burrough for the defendant below took several objections to the indictment; .1. (which goes to the whole,) The substantial charge in all the counts, if any, is the commission of a *forgery*, an offence which the Quarter sessions have no jurisdiction to try. In cases of misdemeanor they can only try breaches of the peace, or such acts as have a manifest tendency thereto. The word *trespasses* in the commission of the peace (*a*), (the only word under which the jurisdiction to try this offence can be sustained, if at all) has always had that construction. 2 *Hawk. c. 8. s. 38*. Wherever the sessions have exercised jurisdiction over any other description of misdemeanors

(a) Vide the Commission of the Peace, set out in the 3d vol. of *Burn's Justice*, tit. *Justices of the Peace*.

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or, it has been by virtue of particular statutes giving them such jurisdiction in express terms; as in the instance of perjury, by the stat. 5 *Eliz. c. 9. f. 9.*: and it has been long settled that no indictment for that offence will lie at the sessions, unless it be laid against the form of the statute (a). Now forgery is no more a breach of the peace, nor has any more tendency to it, than perjury. Serjeant *Hawkins* in the place above referred to says expressly, “ that it hath been of late settled that justices of peace “ have no jurisdiction over forgery or perjury at the common law:” and then assigns as the particular reason, that the chief object of their institution was “ for the “ preservation of the peace against personal wrongs and “ open violence.” He cites in support of his opinion the case of *The Queen v. Yarrington* (b) as in point. That was an indictment found at the sessions for forging a letter in the name of J. S., and being removed into B. R. by certiorari was quashed, because the Sessions had no jurisdiction over the offence. Since then it appears that the question has been at rest, and therefore no subsequent authorities are to be found: but every authority which shews that the Sessions have no cognizance of perjury at common law will equally apply to this case. There is a good reason why that court should not have had jurisdiction over this offence conferred upon it, because there is none in which so many intricate questions arise; and it is the policy of the law to refer all such to the cognizance of the superior courts. But 2dly, (which also goes to the whole indictment) No offence of any kind is stated. In order to constitute an offence there must be something done, which

(a) Vide *Rex v. Bainton*, 2 *Str.* 1083.

(b) *M. 9 Ann. Salk.* 406.

is calculated to bring a burthen or mischief upon some individual or upon the public. Now the whole charge here consists in having placed, or forged as it is called, the letters *R. E.* at the bottom of a certain schedule. Then in order to constitute criminality in such an act it must be shewn that *Richard Elfe*, whose initials they are said to be, had some duty, imposed upon him by some statute, connected with the schedule; and that the commissioners of appeal were bound to take legal notice of his signature affixed to the paper in question. And it should have been stated that it was the duty of *Richard Elfe* to have put his initials or signature to the paper for certain purposes. On the contrary, upon looking into the act it appears that no duty whatever is thrown upon this clerk; he is no more than a mere agent or actor under the commissioners, and every act done by the commissioners is presumed to be done by themselves personally, and not superinduced upon the act of the clerk. Now here the first count alleges the criminal intent in putting the initials *R. E.* to the paper to be this, in order to induce the commissioners to believe that the account had been "inquired into, examined, and approved" by the said *Richard Elfe*; and the second and third counts are to the like effect: but the putting those initials with such intent is no offence known to the law. Then the fourth count for publishing such paper cannot be an offence, if the forgery itself were not so. 3dly, The three first counts charge that the defendant forged the initials *R. E.* purporting to be the initials of the name of *Richard Elfe*. But nothing can be introduced under the word *purport* but what is apparent on the face of the instrument, and it could not be apparent on the face of the schedule of the defendant's income that *R. E.* meant *Richard Elfe*. This objection has been holden fatal in several

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several cases of forgery. *R. v. Jones (a)*, *R. v. Reading (b)*, *R. v. Gilchrist (c)*, and lastly in *R. v. Edsall (d)*. 4thly, Every indictment for forgery must set out the forged instrument in words and figures (e); so that after the jury have done their office, the Court may be enabled to see upon the face of the indictment itself whether the forgery of such an instrument be a crime, and if so, of what degree. The schedule itself therefore at the bottom of

(a) *Dougl.* 302.

(b) This was an indictment tried before *Grofe J.* at the *O. B.* in 1793, charging that the defendant, having in his possession a bill of exchange, purporting to be directed to one *J. King* by the name and description of *J. King*, forged the acceptance of the said *J. King*, &c. Upon reference to the Judges in *Hil.* term 1794, judgment was arrested, because the bill did not purport to be drawn upon *J. King*. MS.

(c) This case was tried before *Buller J.* at the *O. B.* Feb. 1795, and was an indictment for forging an order for payment of money, stating that it "purported to be directed to *George Lord Kinnaird, Wm. Moreland, and Thos. Hammersley*, bankers, and partners, by the names and description of *Messrs. Ranfon, Moreland, and Hammersley*," &c. After conviction, judgment was arrested in *Easter* term 1795 by the advice of all the Judges; because the word *purport* imports what appears on the face of the instrument. MS.

(d) This was to the same effect. The prisoner was tried before *Thomson B.* at the Spring Assizes 1798 for the county of the town of *Southampton*, on an indictment for forging a bill of exchange, charging that the bill purported to be directed to *Richd. Down, Henry Thornton, John Freer, and John Cornwall Jun.* bankers in *London*, by the name and description of *Messrs. Down, Thornton and Co.* bankers, &c. On reference to the Judges in *Trin.* term 1798 the indictment was holden to be bad on the authority of the preceding cases. MS.

(e) This was so ruled in *James Mason's* case, who was tried before *Buller J.* at the Summer Assizes for the county of *Northumberland* in 1792, on an indictment for forging a bill of exchange; and afterwards at a conference of all the Judges in *Trinity* term 1793. On the same principle *Lloyd's* case was ruled before all the Judges in *Trinity* term 1767, in the case of an indictment for sending a threatening letter; where it was determined that the letter must be set forth in the indictment. MS.

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which the letters *R. E.* were put should have been set forth in the indictment, in order that the Court might see whether it were a schedule within the meaning of the act of parliament (a). The appeal was not in respect of the signature but of the schedule itself, therefore the mere signature without the schedule could not have had the effect attributed to it upon the indictment. *5thly*, Where a statute creates a new offence, and at the same time points out a particular method of proceeding, that method alone and no other can be pursued. Now by the stat. 39 *Geo.* 3. c. 13. s. 92. persons guilty of any fraud of this kind are punishable by being doubly assailed. *6thly*, The last count states that he published the paper knowing the said letters *R. E.* at the bottom of the said paper so published to be forged: and there is nothing before said in that count of the letters *R. E.* except by intendment, as being the initials of *Richard Elfe*; which is not sufficient.

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Pell contra. First, taking the offence charged to be that of forgery properly so called, no sufficient reason is assigned either by *Hawkins* (b), or in the case of *The Queen v. Yarrington* (c), on which alone *Hawkins* founds his

(a) Yet in *Wm. Teflick's* case, who was tried at *Bodmin* Summer Assizes 1774, upon an indictment for publishing a forged receipt for money with the name *Stephen Withers*, &c. for the sum of 1 *l.* 4 s., the receipt itself only was set forth as follows: "18th March 1773. Received the contents above by me "Stephen Withers." And it appearing in evidence that the above was forged at the bottom of a certain account, it was objected that the account itself should have been set forth; otherwise non constat that the receipt as stated was a receipt for money. But upon reference to all the Judges in *Michaëmas* term 1774, they held the indictment sufficient; for it was laid to be a forged receipt for money under the hand of *S. W.* for 1 *l.* 4 s. and the bill itself was only evidence to make out that charge. MS.

(b) 2 *Hawk.* c. 8. s. 38.(c) *Salk.* 406.

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opinion, why the sessions should not take cognizance of the offence. *Burn(a)* states that from the stat. 1 Ed. 3., by which justices of the peace were first assigned to keep the peace in every county, down to the third year of Queen *Elizabeth*, their jurisdiction had been from time to time enlarged by a variety of statutes; about which latter time the form of the commission of the peace was settled by Sir *Christopher Wrey* C. J. of B. R. and the other Justices, and has continued the same to this day with little variation. This power and justices jurisdiction to punish offenders against any ordinances and statutes for the good of the peace and for the quiet rule and government of the people: also to inquire of all manner of felonies, *trespasses*, &c. and of all other crimes and offences of which the justices of the peace may or ought lawfully to inquire; with other general words to the same purpose. These terms are certainly large enough to cover the offence of forgery. *Hawkins* himself in commenting upon the word *trespasses* states it to be of very general extent, and in a large sense to comprehend not only all inferior offences properly and directly against the peace, but also all others which are so only by construction, as all *breaches of the law* are said to be. According to his own definition therefore forgery would be included, being constructively a breach of the peace inasmuch as it is a breach of the law: and the exception which he afterwards introduces in respect of forgery is in contradiction to what he had just before said. The case then of *The Queen v. Varrington* is the only authority on which the position stands, and that is certainly not law to the full extent of the doctrine there laid down; for it is there said that justices of the peace have no jurisdiction

(a) 3 Vol 4-5. tit. *Justices of the Peace*. 2. *Of the Commission*, &c.

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over any offence than what is given to them by some statute: but *Hawkins* shews many instances to the contrary; and in 4 *Com. Dig.* tit. *Justices of the Peace*, B. 33. it is said, "they may inquire of any thing done to the fraud " or deceit of another." Now forgery is of that kind; though like other frauds it is no direct breach of the peace, nor has any immediate tendency thereto; and Lord C. B. *Comyns* instances, "as if a man read a writing to an illiterate person in other words than were written, by " which means he seals it." For which he cites 1 *Sid.* 312. "Or if a man play with false dice." 2 *Roll.* 107. It is not disputed that the sessions have jurisdiction over cheats, which *Hawkins* (a) describes to be "deceitful practices in " defrauding or endeavouring to defraud another of his " known right by means of some artful device," &c. That definition includes the present case. So *R. v. Brayne*, M. 12 *Geo.* 1. (in the Crown Office) was an indictment found at the *Bristol* sessions for fraudulently obtaining tea in the name of another; which was removed into this court by certiorari, and no objection taken to the jurisdiction of the sessions. Again, the case of *R. v. Beale*, E. 38 *Geo.* 3. was an indictment against the defendant, who was clerk to the agent for the *French* prisoners of war at *Porchester Castle*, for taking bribes in order to procure the exchange of some of them out of their turn. This was found at the *Hampshire* sessions, and being removed hither by certiorari the Court inflicted a heavy punishment upon the defendant, without any question of the jurisdiction. The like was the case of *R. v. Rispol* (b), where the Court held that the sessions had jurisdiction to

(a) 1 Vol. ch. 71. f. 1.

(b) 3 *Burr.* 1320.

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find an indictment for a conspiracy to injure a man's credit by falsely charging him with having taken a quantity of hair out of a bag. None of these offences were properly breaches of the peace or tending thereto. But 2dly, although the paper in question be called a forged paper or instrument in the indictment, yet that will not constitute the offence a forgery if it be not so in law. Now this does not come under the legal definition of a forgery, which according to Lord Coke in 3 *Inst.* 168. is properly taken when the act is done *in the name of another person*; as in *R. v. Ward (a)*, and in *R. v. Yarrington*, which appears by reference to the record in the Crown Office to have been a forgery in the name of *J. Caruthers*, and thereby attempting to get a quantity of earthen ware delivered to the defendant. In *Robinson's case (b)*, which was an indictment on the stat. 9 *Geo.* 1. c. 22. for sending a threatening letter without any name subscribed thereto, it appeared to be signed with the letters *R. R.*, and this was holden not to be the signature of a name. (*Le Blanc J.* Can it be contended that forgery cannot be committed by signing the initials of a name, for example, as an acceptance on a bill of exchange, which in common experience is frequently the case?) Perhaps it would be so in that case, because the acceptance of bills in that manner is sufficient according to the custom of merchants; and it would be sufficient to bring the case within the

(a) 2 *Ld. Ray* 1465. 2 *Str.* 747. 1 *Sid.* 142.

(b) *Leach's Crown Cjs.* last edit. 2 vol. 889. Mr. Justice Buller, in delivering the opinion of the Judges at the O. B. in this case said, "As to the first objection; Whether the letter be with or without a name (the indictment charged it to be *without* a name) is a simple fact appearing on the face of the letter itself. It is signed with the two letters *R. R.* which are so far from being a name that no man on looking at the letter only can tell whether it meant to refer to any name or what that name was." MS.

statute. But this not being in the name of another, is not a forgery at common law, but is indictable as a fraud upon the revenue, and against the act of parliament which prohibits such practices, and is therefore a public cheat of which the sessions have cognizance. (*Le Blanc J.* What was the legal effect of signing this name to the paper, taking it to have been written at length?) It was calculated to shew that it was the opinion of the clerk to the commissioners acting in the capacity of their servant or agent, that the defendant was rated too highly. It therefore amounts to the same thing as defrauding the master by making use of the servant's name to gain credit for a falsity.

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against
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LORD KENYON C. J. An indictment for a cheat at common law cannot be maintained without some false token be made use of: a mere false affirmation is not sufficient (*a*). However the main difficulty to get over in this case is the want of jurisdiction in the quarter sessions. I have always had a general impression on my mind that it was a settled point that forgery was not under the cognizance of the sessions; and I rather think it was so determined soon after I came to the bar, though I do not remember the particular case. But I am sure it has been always so considered by the profession in my remembrance, and I have formerly given opinions to that purpose. Therefore with all the inclination which I feel against giving way to small objections, I cannot get over this against express authority and received practice for so long time. I must also consider this as an indictment for forgery; it is so stated in every count: and it is no answer to say that if

(c) Vide *Rex v. Lara*, 7 Term Rep. 565.

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a man be indicted for one offence he may be convicted because he is guilty of another kindred offence. The case of *The Queen v. Yarrington* stands supported by concurrent opinions down to the present time, and has been acted upon nearly a century; it is now too late to disturb it. The offence however is of a very serious case, and no blame is imputable to the magistrates below for what they have done, though the judgment cannot be supported in point of law.

LE BLANC J. Even if the objection to the want of jurisdiction had been removed, it would have been found very difficult to have answered the other objections.

Per Curiam,

Judgment reversed.

Thursday,
Jan. 29th.

The KING against BARKER.

The Court refused a criminal information against a magistrate for returning to a writ of certiorari a conviction of a party who had been convicted by the magistrate's clerk; the conviction returned being warranted by the facts.

GIBBS and *Best* moved for a criminal information against the defendant, who was mayor of the borough of *Great Yarmouth*, upon these facts disclosed by affidavit: That a warrant of distress issued on the 20th of *October* last under the hand and seal of the defendant against one *Jonathan Symonds*, by virtue of which his goods were taken in execution; in consequence of which application was made on behalf of *Symonds* to the defendant's clerk for copies of the warrant and of the proceedings on which the defendant had granted the same, which the clerk promised to give on the next day. And accordingly on the 21st the clerk furnished *Symonds* with a copy of a conviction, dated 3d *October* 1800, which was compared with the

the original signed by the defendant, then being upon the file of informations and other proceedings taken and recorded before the defendant during his mayoralty. • That in *Michaelmas* term last *Symonds* obtained a writ of certiorari directed to the defendant to return the conviction into this court, in consequence of which the defendant returned a record of conviction in a different form from that of which *Symonds* had been furnished with a copy; which conviction so returned purported to bear date on the 3d of *October* 1800, although the deponent had reason to believe, from conversation with the defendant's clerk, that no conviction had been signed by the defendant against *Symonds* till a fortnight afterwards; and *Symonds* swore that he had not been charged with more than one such offence as that mentioned in the conviction.

The conviction itself returned, and the copy which had been previously given to *Symonds* by the defendant's clerk, were both annexed to the affidavit; and from comparing them it appeared that they related to the same offence, committed on the same day, and under the like circumstances: but the conviction returned to this Court was drawn out at more length, and in a more formal manner than the one from which *Symonds*'s copy had been taken.

It was pressed against the defendant that the conduct pursued by him upon this occasion tended to much vexation and oppression against parties convicted, and was in itself illegal. That however magistrates might be indulged with a reasonable time for drawing up their convictions in proper form, yet when regularly signed and issued by them to the parties, and acted upon as such by levying a distress under them, they ought to be concluded from al-

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tering them afterwards. That this practice led the parties to incur an unnecessary expence; as in the present instance, where *Symonds* having been furnished with the copy of the then form of conviction, which was clearly bad, was thereby induced to incur the expence of prosecuting a writ of certiorari in order to relieve himself from it.

Garrow, on the part of the magistrate, suggested that the copy with which *Symonds* had been furnished was merely intended as a copy of the minutes of the conviction; and that it was the constant practice of magistrates to proceed in this manner, first taking down minutes of the proceedings on which their judgment was founded, and afterwards having them drawn up in form, before they were filed of record.

Lord KENYON C. J. If the magistrate has done no more than return the conviction in a more formal shape, instead of sending it up in the informal manner in which it was first drawn, and supposing that the facts as they really happened will warrant him in the return he has now made, the contrary of which is not imputed, I am of opinion that it was not only legal but laudable in him to do as he has done, and he would have done wrong if he had acted otherwise. It is a matter of constant experience for magistrates to take minutes of their proceedings, without attending to the precise form of them at the time when they pronounce their judgment, to serve as memorandums for them to draw up a more formal statement of them afterwards to be returned to the sessions; and it is by no means unusual to draw up the conviction in point of form after the penalty has been levied under the judgment.

ment. Nor is there any legal objection to this method, provided the facts will warrant them in stating what they do. It is no answer to say that a party convicted may be thereby induced to incur an unnecessary expence in suing out a certiorari to get rid of an informal conviction; for a mere informality in the manner of drawing up the conviction ought not to be the inducement for removing it into this court, but some substantial defect in the justice and legality of the proceeding itself before the magistrate.

Per Curiam,

Rule refused (*a*).

(*a*) See the next case.

The KING *against* SYMONDS.

Saturday,
Feb. 7th.

THE conviction returned to the writ of certiorari mentioned in the last case was founded upon the stat. 7 Geo. 1. c. 11. and was as follows;

Town and borough of *Great Yarmouth* in *Norfolk*. Be it remembered, That on the 1st of *October* in the 46th year of the reign, &c. at *Great Yarmouth* in the county of *Norfolk*, *E. H.* in his proper person cometh before *Samuel Barker* Esq. mayor, and one of his majesty's justices of the peace of our said lord the king in and for the said borough, and then and there upon his corporal oath giveth me the said mayor to understand and be informed, that *J. Symonds*, of *Great Yarmouth* aforesaid, merchant, after the 25th of *March* 1721, to wit, on the 20th *September* 1800, did land within the town of *Great Yarmouth*, from out of a wherry, *B. S.* master, twelve chaldron of coals, for which the rates and duties charged thereon by an act of parliament made in the seventh year, &c.

Where an act gives power to a magistrate on a summary conviction to award the *reasonable* charges of taking a distress, he must ascertain the amount in the conviction; and an adjudication that the defendant shall pay the *reasonable* charges of the levy is bad.

(7 Geo.

1800.

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against
BARKER.

1800.

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The KING
against
SYMONDS.

(7 *Geo. I. c. 11.*) had not been paid, without a certificate in writing being given to the said *J. S.* by the collector or receiver of the said rates and duties for leave to land or bring the said twelve chaldrons of coals into the said town; contrary to the form of the statute in that case made and provided, whereby the said *J. S.* hath forfeited the sum of 20*s.* for every chaldron of the said coals so brought into the said town as aforesaid, amounting in the whole to the sum of 12*l.*, over and above the rates and duties by said act charged on said coals, one moiety thereof to the use of the informer, and the other moiety to the use of the poor of the said parish of *Great Yarmouth*, &c. (The conviction then proceeded to state in the usual form the summons to the defendant to appear and answer the charge; his appearance, &c. and confession. It then proceeded;) It is therefore adjudged by me the said mayor, upon the free and voluntary confession of the said *J. S.* that all and singular the matters and things contained in the said information are true; and thereupon I the said mayor, on the said 3d of *October* in the year aforesaid, at *Great Yarmouth* aforesaid, in the county aforesaid, do convict the said *J. S.* of the said offence in and by the said information charged against him, and he the said *J. S.* is hereby convicted thereof by me the said mayor, upon his own free and voluntary confession, according to the form of the statute in such case made and provided; and I do adjudge that the said *Jonathan Symonds* for the offence aforesaid hath forfeited the sum of 20 shillings for every chaldron of said coals, amounting in the whole to the sum of 12*l.*, over and above the rates and duties by said act charged on said coals, together with the reasonable charges of recovering the same: and I do adjudge that one half

half of the said sum of 12 *l.* be paid to the said informer *E. H.* and the other half of the said sum of 12 *l.* be paid to the poor of the parish of *Great Yarmouth* aforesaid, according to the form of the statute in such case made and provided. In witness whereof, &c.

S. Barker. (L. S.)

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Gibbs and *Best* objected, 1. That the convicting magistrate is stated to be a justice of peace for the *borough* of *Great Yarmouth*, and the offence is alleged to have been committed within the *town* of *Great Yarmouth*, and non constat that the borough is co-extensive with the town, and that the magistrate had cognizance of the offence. 2. The penalty is to be given half to the informer and half to the poor of the parish where the offence is committed. But here the latter moiety is given to the poor of the said parish of *Great Yarmouth*, which parish is not named before, and non constat that the offence was committed there; neither is the parish stated to be within the county of *Norfolk*. 3. The magistrate adjudges to the informer *the reasonable charges* of recovering the penalty, and does not ascertain what the sum shall be (a).

Garrow contra admitted that the last objection was fatal; though the statute on which the conviction was founded gives power to the convicting magistrate to

(a) The act in question (c. 5.) enables the mayor of *Yarmouth* to cause the penalties to be levied by distress, "together with the reasonable charges" of taking and keeping such distress, &c. See *Rex v. Hall, Corp.* 60. where the conviction was quashed on the same objection.

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The KING
against
SYMONDS.

order the costs and charges of levying the distress to be paid by the defendant.

The Court were of that opinion, and

Quashed the Conviction.

*Thursday,
Jan. 29th.*

CHAPLIN *against* ROGERS.

After a bargain and sale of a stack of hay between the parties on the spot, evidence that the vendee actually sold part of it to another person (by whom, tho' against the vendee's approbation, it was taken away) is sufficient to warrant the jury in finding a delivery to and acceptance by the vendee, thereby taking the case out of the statute of frauds.

IN an action for goods sold and delivered, the case proved was, that the parties being together in the plaintiff's farm yard, the defendant, after some objections and doubts upon the quality of a stack of hay (particularly the inside part) then standing in the yard, agreed to take it at 2*s.* 6*d.* per hundred weight. Soon after he sent a farmer to look at it, whose opinion was unfavourable. But about two months afterwards another farmer of the name of *Loft* agreed with the defendant for the purchase of some of this hay still standing untouched in the plaintiff's yard, and the defendant told *Loft* to go there and ask what condition it was in, saying he had only agreed for it if it were good. The plaintiff having informed *Loft* it was in a good state, he agreed to give the defendant 3*s.* 9*d.* per cwt. for it, the defendant having told him that he had agreed to give the plaintiff 3*s.* 6*d.* for it. *Loft* thereupon brought away thirty-six hundred weight; but this latter fact was without the knowledge and against the direction of the defendant. There was a contrariety of evidence as to the quality of the hay when the stack was afterwards cut. At the trial before *Hotham B.* on the last *Norfolk* circuit, *Sellon* Serjt. for the defendant objected that the contract of sale was fraudulent and void by the statute of frauds, being for the sale of a commodity no part

part of which was delivered, and of which there was no acceptance by the defendant. But the learned Judge left it to the jury to decide whether the sale had been fraudulent, and whether under the circumstances there had been an acceptance by the defendant; and they found for the plaintiff on both points, and gave him 50*l.* damages, being the value of the hay at the price agreed for. In the last term a rule was obtained calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had, on the grounds that the learned Judge had left that as a question of fact to the jury, which he himself ought to have decided as an objection in point of law arising on the statute of frauds; and because the evidence did not warrant the verdict.

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Wilson now shewed cause. The objections may either be regarded as arising upon the statute of frauds (a), or upon the form of the count for goods sold and delivered, which requires proof of a delivery as well as a sale. Now there was sufficient evidence of a delivery to and acceptance by the defendant, and the jury having found the fact with the plaintiff, the case is taken out of the statute of frauds. The bulk of the commodity purchased precluded any actual delivery of it; but that which took place was tantamount to it. Both parties were upon the spot at the time, and considered the bargain as concluded, and the stack in the possession of the defendant. The defendant afterwards acted upon it as such, and sold part of it to another person, which is evidence in itself of his having taken possession of it. Besides, that person actually removed part of it away; and though this is stated to have been

(a) 29 *Car.* 2. c. 3. s. 17.

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against the defendant's direction, yet that cannot avail as between these parties, with respect to whom *Loft* must be considered as the defendant's agent acting within the scope of his authority, the excess being without the knowledge of the plaintiff. The question of fraud left to the jury was as to the existence of any fraud in fact.

Garrow contra. The form of the declaration required proof of a delivery in fact of the goods, otherwise the count for goods bargained and sold would be useless. Though the jury were the proper judges how far the plaintiff had been guilty of any fraud in fact, yet the judge ought to have decided upon the question of law submitted to him, whether upon the case proved it did not fall within the statute of frauds.

LORD KENYON C. J. It is of great consequence to preserve unimpaired the several provisions of the statute of frauds, which is one of the wisest laws in our statute book. My opinion will not infringe upon it; for here the report states that the question was specifically left to the jury whether or not there were an acceptance of the hay by the defendant, and they have found that there was, which puts an end to any question of law. I do not mean to disturb the settled construction of the statute, that in order to take a contract for the sale of goods of this value out of it there must either be a part delivery of the thing or a part payment of the consideration, or the agreement must be reduced to writing in the manner therein specified. But I am not satisfied in this case that the jury have not done rightly in finding the fact of a delivery. Where goods are ponderous, and incapable as here of being handed over from one to another, there need
 not

not be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other indicia of property. Now here the defendant dealt with this commodity afterwards as if it were in his actual possession; for he sold part of it to another person. Therefore as upon the whole justice has been done, the verdict ought to stand.

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The other Judges agreed that there was sufficient evidence of a delivery to and acceptance by the defendant to leave to the jury.

Rule discharged.

WADE *qui tam* against WILSON.

Thursday,
Jan. 29th.

THIS was an action of debt for penalties on the stat.

12 Ann. st. 2. c. 16. for taking more than legal interest for the loan of money. The 8th count, on which alone the verdict was taken for the plaintiff, stated that the defendant after the 29th September 1714, to wit, on the 4th of April 1708, at *Thirsk* in the county of *York*, did lend to one *C. Goulton* the sum of 600*l.*, to be repaid by the said *C. G.* to the defendant at the expiration of one year then next following, for the forbearance of which said last-mentioned sum of 600*l.* for that time it was then and there agreed by and between the said *C. G.* and the defendant that the defendant should be paid interest at the rate of 5*l.* for the forbearing of 100*l.* for a year over and besides the premium hereafter mentioned of ten guineas; and the defendant after the said 29th September 1714, to

Upon a contract to forbear 600*l.* for a year, reserving interest at the rate of 5 per cent., for which a premium was paid in the first instance, the usury is complete upon the lender's receiving any part of the growing interest within the year. The contract may be laid as for a forbearance to *A.* alone, who was the real debtor, although *B.* had joined with him in the security given to the lender. If *A.* be indebted to *B.*, and *B.* to *C.*, and *C.* agree for an usurious consideration to accept *A.* for his debtor instead of *B.*, this may be laid to be an usurious loan of so much from *C.* to *A.*

and *C.* agree for an usurious consideration to accept *A.* for his debtor instead of *B.*, this may be laid to be an usurious loan of so much from *C.* to *A.*

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wit, on the 4th of *April* 1798, at, &c. corruptly took, accepted, and received of the said *C. G.* the sum of ten guineas as and by way of a premium for the said loan and forbearance of the last-mentioned 600*l.*, for the time in that behalf aforesaid, and afterwards, to wit, on 12th *October* 1798, at, &c. corruptly took, accepted, and received of the said *C. G.* the further sum of 15*l.* for the forbearing of the last-mentioned sum of 600*l.* from the said time of lending thereof until the 4th of *October* in that year, and as and by way of interest for that sum for that time; and the plaintiff further says, that the defendant by taking, accepting, and receiving the said last-mentioned sums of ten guineas and 15*l.* as aforesaid, and for the cause in that behalf aforesaid, corruptly took, accepted, and received of the said *C. G.* for the forbearing of the said last-mentioned 600*l.* from the said time of the said lending thereof until the said 4th of *October* in the year last aforesaid more than at the rate of 5*l.* for the forbearing of 100*l.* for a year contrary to the form of the statute, whereby, &c. To this there was a plea of the general issue.

At the trial at the last assizes at *York* before *Chambre B.* the facts so far as they relate to the usury alleged in the 8th count were shortly these. *Goulton*, therein mentioned, owed one *Flintoft* 600*l.* on bond, and *Flintoft* and his son were indebted to the defendant in 1200*l.* on their promissory note. *Flintoft* not being able to pay the defendant more than half of his debt on account of *Goulton*'s default to him, it was agreed between the respective parties at a meeting held for the purpose at *Easingwold* on the 4th of *April* 1798, that the defendant should accept *Goulton* and another person of the name of *Vates* by way of surety for him as his (the defendant's) debtors for the remain-
ing

ing 600*l.* instead of *Flintoft*; the defendant however saying that he would only lend *Goulton* the money for one year, which was agreed to. Accordingly *Goulton* and *Vates* gave their promissory note of that date, whereby they jointly and separately promised to pay to the defendant or order 600*l.* on demand for value received, with interest after the rate of 5*l.* per cent. per annum; and the defendant at the same time received from *Goulton* ten guineas by way of premium. *Flintoft* however having omitted to bring *Goulton's* bond with him, it was agreed that the old securities should be delivered up the next day at *Thirsk*, at which time and place *Goulton's* bond to *Flintoft* and *Flintoft's* note for the original debt of 1200*l.* to the defendant were respectively delivered up and cancelled. On the 12th of *October* following the defendant received 15*l.* for half a year's interest on *Goulton's* note; and at the end of the twelvemonth received the other half year's interest. The action was commenced as of the 6th of *November* 1798.

It was objected principally, that the loan being for a year and the premium paid for that time, the usury was not complete till the end of the year when the whole interest was received in addition to the premium. But the learned Judge over-ruled the objection, being of opinion that as soon as the defendant received interest at five per cent. for the first half year in addition to the premium, a moiety of which at least was applicable to that half year, he had received more than after the rate of legal interest for half a year, and consequently that the offence was then complete. It was next objected that the case proved did not apply to the count; that there was no loan of money, as stated, none having been paid to or received by *Goulton*; and that the making himself the debtor instead of *Flintoft* and giving his own note for the money did not constitute a

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loan, though it might have been laid as a corrupt contract : or if it did constitute a loan it was not such to *Goulton* alone but to him and *Yates* who joined in the security. And it was further objected that the loan was improperly stated to be on the 4th of *April* 1798, the time when the agreement was made, and the note given by *Goulton* and *Yates* to the defendant, for that they did not take effect till the next day, the 5th, when the original security given by the *Flintofts* for 1200*l.* and the security given by *Goulton* to *Flintoft* were cancelled. The learned Judge however was of opinion that a loan to *Goulton* was sufficiently proved ; that *Yates* was merely a surety for the payment of the money ; and that the contract took effect from the 4th of *April*, the time when it was made, and was not suspended till the next day, the only reason for not cancelling the other securities on the 4th being the neglect of the parties to bring them to the place. Accordingly the jury (by the advice of the Court) found a verdict for the plaintiff on the 8th count, being the count best adapted to the proof.

These objections were urged again upon a rule to shew cause why there should not be a new trial ; against which

Holroyd was now to have shewn cause in support of the verdict ; but the Court desired to hear the counsel on the other side.

Larw and *Wood* in support of the rule. 1st, The usurious contract laid is for a loan of money from the defendant to *Goulton* ; but it was not a money transaction ; it was a mere substitution of one debtor for another, of *Goulton* for *Flintoft*. 2^{dly}, If it were a loan of money by
con-

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construction of law, at any rate it did not become such till the exchange of the securities, which was not till the 5th of *April*, whereas it is laid that the usurious interest was taken for forbearance from the 4th. Till the actual exchange took place the original debts from *Goulton* to *Flintoft*, and from *Flintoft* to the defendant continued in force; for it was not in the contemplation of the parties that *Goulton* and *Flintoft* should both be indebted to the defendant for the same loan at the same time. Therefore though *Goulton's* note was given to the defendant on the 4th, yet it was not to take effect till the other securities were given up in lieu of which it was received. 3dly, Supposing it to be a loan, which was to commence on the 4th of *April*, yet the contract to forbear being laid to be for a year, till that time was expired there was a *locus penitentiae*, and the usury was not complete. The premium was entire, and is alleged to have been received for the whole year; then it could not be apportioned and part of it tacked to the half year's interest. The money received including the premium is less than legal interest for the whole year on the sum advanced: under such an agreement the usury could not be complete till more than 30*l.* had been received. In *Fisher q. t. v. Beasley* (a) a premium was taken in the first instance for the forbearance of a loan for six months, reserving interest; Lord *Mansfield* nonsuited the plaintiff at the trial, conceiving that the usury was complete on the taking of the premium, and that the time for bringing the action was elapsed; but the Court afterwards held that the usury was not complete till the half year's interest was received, which together with the premium amounted to more than 5 per cent. There the interest was reserved at

(a) *Dougl.* 235.

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the end of the half year, but here the interest was reserved yearly; therefore upon the same principle the usury was not committed till the whole year's interest had been received, amounting together with the premium to more than lawful interest. *4thly*, The security was given by *Rates* and *Goulton* jointly as well as severally; the contract therefore was to forbear to both, and a forbearance by the defendant to one only would not have been a compliance with it. Then the proof does not sustain the count, which lays it to be a contract to forbear to one only.

Lord KENYON C. J. There is no weight in any of the objections. This was in substance a loan of money from the defendant to *Goulton*, although the ceremony of handing the money over from the one to the other did not take place. But the loan originally advanced to *Flintest* was by agreement transferred to *Goulton*. This transaction took place on the 4th of *April*, when the note was given, and on that day it was agreed that the old securities should be given up, though it was not actually done till the next day, the parties not having them ready at the place. The objection proceeds upon an assumption of fact not well founded. The case of *Fisber q. t. v. Beasley* does not apply; for there the only question was, Whether the usury were complete before the party had received any interest at all, the amount of the premium being within the legal rate of interest. But here the party having ten guineas premium in hand, and interest accruing from day to day, actually received interest *quà* interest for half a year, which made what he received upon the whole amount to more than lawful interest for that time upon the sum lent. It is impossible upon this statement not to say that the usury was complete when the half year's interest was received. And this

agrees with the charge, which is, that by taking the premium of ten guineas for the loan in the first instance, and by afterwards taking 15*l.* for the forbearing of 600*l.* from the 4th of *April* to the 4th of *October*, the defendant corruptly took more than at the rate of five per cent., which is an undeniable conclusion, and according to the real fact.

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GROSE J. declared himself of the same opinion.

LAWRENCE J. The argument is, that the contract being for forbearance of the principal for a year, and interest being reserved yearly, therefore there could be no usury committed till the end of the year: and it is supposed that the case of *Fisher v. Beasley* is an authority for that position. But that is not the case here; for the contract is stated to be for the forbearance of the loan for a year, with interest to be paid at the rate of 5 per cent.; it is not stated that the defendant was to wait for his interest till the end of the year; but it was to accrue, as by law it does, *de die in diem*. Therefore after the receipt of the premium as soon as any interest as such was paid on the loan, though but for a day, it would constitute usury. The parties themselves did not consider that interest was not due till the end of the year, for it was actually paid by the one and received by the other at the end of the first half year without objection. Here then is a premium paid of ten guineas at first which was to run through the whole year, and interest accruing daily on the principal sum, the defendant actually received interest for the first half year, which together with what he had before received by way of premium amounts to more than legal interest. That immediately constituted usury. As to the

1801. contract being to forbear to both *Goulton* and *Yates*, that is not strictly so; the contract was to forbear to *Goulton* only, though *Yates* was required to join in the note by way of security.

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LE BLANC J. This must certainly be taken to be a loan of money from the defendant to *Goulton* on the 4th of *April*; for *Goulton* being indebted to *Flintoft*, and this latter to the defendant for money before advanced, it was on that day agreed that the defendant should accept *Goulton* as his debtor in satisfaction of so much money as *Flintoft* owed him; for which purpose *Goulton* was to give the defendant a new security, and the old ones were to be cancelled. *Goulton* accordingly gave his note for the amount; and from that day interest ceased to run upon the old securities, and they would then have been delivered up but for the accident of their having been left behind. Then the premium was given upon an agreement to forbear from the 4th of *April* the sum of 600*l.* with interest at the rate of 5*l.* per cent. And it is next objected that the premium is not to be apportioned to any part of the growing interest, because it is said that it did not accrue till the end of the year; and yet the defendant received it as growing interest at the end of the first half year. But I am of opinion that at least one moiety of the premium is to be apportioned to the half year's interest which was received; and that the true spirit of the agreement was that the premium was to run through the whole year in proportion as the interest accrued: and therefore upon the whole I think the contract proved sustains the count, and that the
usury

usury was complete when the first half year's interest was paid.

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Rule discharged (a).

(a) Vide *Lloyd qui tam v. Williams*, 3 *Wils.* 250. More than legal interest being taken in advance for a certain time, the usury was holden to be complete on the receipt of the money, and not at the expiration of the time for which the forbearance was agreed to be.

RAWSON and Others *against* JOHNSON.

Saturday,
Jan. 31st.

THIS was an action on the case, to recover damages for the breach of a contract, whereby the defendant undertook to sell and deliver to the plaintiffs a certain quantity of malt at a given price. This was laid differently in different counts, and at the trial at the last assizes at *York* the plaintiff obtained a verdict, which was entered generally on all the counts. The two first counts, in which was averred a part delivery of the malt, were admitted to be good; but a rule was obtained calling on the plaintiffs to shew cause why the judgment should not be arrested for the defect of the third count, in only averring a readiness and willingness in the plaintiffs to pay for the malt, and not averring the actual tender of the price agreed upon. The count in question was as follows:

In an action for the non-delivery of malt, which the defendant had undertaken to deliver on request at a certain price, it is sufficient for the plaintiff in his declaration to aver such request, and that he was ready and willing to receive the malt and to pay for it according to the terms of the sale, but that the defendant refused to deliver it, without averring an actual tender of the price.

And whereas also afterwards, to wit, on the 12th of *November* 1799, to wit, at *Leeds* in the county of *York*, in consideration that the plaintiffs, at the instance and request of the defendant, had then and there bought of the defendant a certain large quantity (to wit) 100 quarters of malt, at and for a certain price then and there agreed

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upon between them, he the defendant undertook and then and there faithfully promised the plaintiffs well and truly to deliver to them the said 100 quarters of malt whenever he the defendant should be thereunto afterwards requested; and the plaintiffs in fact say, that although the defendant afterwards, to wit, on, &c. at, &c. requested the defendant to deliver to them the said last-mentioned 100 quarters of malt, and were then and there *ready and willing to pay the said defendant for the same*, according to the terms of the said sale, and although the plaintiffs were then and there *ready and willing and offered to accept and receive* the said last-mentioned 100 quarters of malt of and from the said defendant, yet the defendant, not regarding his said last-mentioned promise, &c. did not, when he was requested as aforesaid, or at any other time before or since, deliver to the plaintiffs the said last-mentioned 100 quarters of malt, or any part thereof, but hath hitherto wholly refused and still doth refuse, whereby, &c.

Larv and Lamb, shewed cause against the rule. The two first counts are out of the question, because there being an averment of a part-delivery of the malt without payment, and the contract stated being entire, the defendant is precluded from saying that such a delivery of the rest ought not to have been made, or that the payment was a condition precedent. As to the third count, the averment that the plaintiffs were *ready* to pay the defendant is sufficient; and distinguishes this from the case of *Morton v. Lamb* (a), where the opinion of the Court turned upon the want of such an averment. A *reading/s*

(a) 7 Term Rep. 125.

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to pay implies an ability as well as a willingness to do the act; and it could only be satisfied in proof by shewing that the plaintiffs had the money by them to pay for the malt if the defendant had been ready to deliver it. The case cited was stronger than the present, because there a particular time was fixed, so that a formal tender might more easily have been made; but even there some of the Judges thought that an averment of this sort would have been done; whereas here no time being mentioned, a performance of the contract by the defendant within any reasonable time would have been sufficient; and a tender by the plaintiffs could not be necessary till the defendant might be expected to be ready to do the act (a). It is not required in all cases to make an actual tender, where from the nature of the thing it would be nugatory. In *Merritt v. Rane* (b), which was finally decided in the House of Lords, the agreement was, that in consideration of 250 *l.* paid to the defendant he was to transfer certain stock to the plaintiff before a certain day, within three days after demand in writing, upon payment of the further sum of 9000 *l.* The plaintiff averred that he appointed one *J. M.* to demand the stock and pay the price, that the defendant was required by note in writing to transfer the stock on a certain day, when *J. M.* attended all the while the books were open, but that the defendant did not appear to transfer, &c. It was objected (*inter alia*) that the plaintiff should have shewn that he had the money there to have paid on the transfer; but Lord C. J. *Pratt* said, “the payment of the money is no condition precedent, but a concurrent act; and if the defendant had been there the plaintiff must have laid down

(a) Vide *Ferrand v. Pearson*, E. 2 Geo. 1, C. B. Bull. N. Pri. 156.

(b) 1 *Str.* 458.

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“ his money, though not so as to part with it till the
“ transfer.” And the Court afterwards said, “ as to the
“ plaintiff’s not shewing a tender, we think that ought to
“ come from the defendant by way of excuse, that he
“ was there ready to have transferred if the plaintiff had
“ been there to have paid the money.” The ground
therefore of the determination was, that as the actual
performance of the act was disappointed by the party’s
non-appearance, such performance in fact was unne-
cessary. So here, it being uncertain when the defendant
would be ready to deliver the malt, it could not be neces-
sary that the plaintiffs should carry the money constantly
with them. Besides, it is averred that the defendant re-
fused to deliver the malt, and a refusal to deliver generally
where no time is fixed for the delivery is a renunciation
of the contract, and dispenses with a tender. All the
cases cited in *Morton v. Lamb*, in support of the neces-
sity of a strict averment of a tender, were cases upon
demurrer, except the case of *Callonel v. Briggs (a)*, which
was only a nisi prius decision. But this being after ver-
dict, every thing will be intended that was necessary to
support the facts laid in the declaration; and therefore it
must now be presumed either that the plaintiffs were pre-
pared to have paid the money on the spot if the defend-
ant had been ready to deliver the malt, or that he refused
to do so, in which case no tender was necessary. If a
party say he will not receive the money, that has been
ruled to dispense with the necessity of a tender. So here
a general refusal to deliver the malt is the same in effect.
The objection to the sufficiency of this averment may be
resolved into this, that the defendant had a right to re-

(a) *Salk.* 113.

quire the plaintiffs' money to be paid to him first, and then he might determine whether or not to deliver the malt. In covenant for non-payment of rent it is sufficient to aver that the tenant was on the land the last day *ready to pay*, but that nobody was there to receive it on the part of the landlord; but there never is any averment in such case that he *tendered* it.

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Holroyd contra. Where mutual acts are to be done, one party cannot maintain an action against the other for non-performance without averring either an actual performance or a direct tender or offer to perform his own part. The case of *Morton v. Lamb* only decided that a declaration without such an averment was bad: and *Lawrence J.* there said, that the plaintiff must either aver performance or a tender; and that is the result of all the cases collected in the report of that case. It was expressly so decided by Lord Holt in *Callonel v. Briggs* (a), also in *Thorpe v. Thorpe* (b), *Kingston v. Preston* (c), and *Gondifon v. Nunn* (d). It is not enough to be ready and willing to pay unless that be made known to the other party; this may be done without actually parting with the money, which is not necessary, according to what was said in *Merrit v. Rane*, unless the defendant had been ready to have delivered the malt at the same time; but such a readiness amounts to a tender, and ought to be so pleaded. It is different, as in that case, where an act is to be done at a particular time and place, there if the party does not attend a tender is impossible, and therefore not necessary to be shewn; but such non-attendance must be pleaded in order to excuse the necessity of the tender.

(a) *Salk.* 113.(b) *Ib.* 171.(c) *Dougl.* 688.(d) 4 *Term Rep.* 761.

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LORD KENYON C. J. However technical rules are to be attended to, and in some cases cannot be dispensed with, yet in administering justice we must not lose sight of common sense, and the common sense of this case will not be found to militate against any rule of law. No doubt can be entertained how this case should be decided; one man agrees to do a certain act in consideration of another man doing another act; the acts are to be done at the same time and place; one of the parties goes there intending to do his part, and the other stays away altogether; the former is obliged to bring his action for this breach of the agreement, and he pleads according to the truth of the fact, that he was at the time and place appointed ready to have received the other's goods and to have paid the stipulated price for them, which is all that he was bound to do, and that nobody was there on the part of the defendant, or that the goods were not there ready to be delivered: would it be any answer to say that he ought to have pleaded a tender of the money? Now this case is the same in effect: the defendant undertook to deliver the malt when he should be requested, and the plaintiff's plead that they made the request to him, and were ready and willing to have accepted and paid for it, but that he did not deliver it when requested, or at any other time, but refused so to do. To be sure under this averment the plaintiff's must have proved that they were prepared to tender and pay the money if the defendant had been ready to have received it and to have delivered the goods: but it cannot be necessary in order to entitle them to maintain their action that they should have gone through the useless ceremony of laying the money down in order to take it up again. It would be repugnant to common sense to require it. It is reported in the case of

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Morton v. Lamb, that I said that the plaintiff should have averred a performance or a *readiness to perform* his part of the contract; I do not doubt that I said so, and I still think it was rightly said: and if so it would decide this case. However, if it were necessary I see no reason why we should not avail ourselves of another argument urged at the bar, namely, that this is after verdict, when every thing may be presumed to have been proved which was necessary to sustain the declaration. It is true that a verdict will not cure a defective case, but it will cure a case defectively stated.

GROSE J. The doctrine in question was much discussed in the case of *Morton v. Lamb*; and we there held that where mutual acts are to be performed, the plaintiff, in order to maintain his action for the non-performance by the other party, must shew that he was ready to do whatever was required to be done by himself. And I have lying before me the ground of objection that was made in arrest of judgment in that case, namely, that the plaintiff had not averred "that he had tendered to the defendant the price of the corn, or was ready to have paid for it on delivery;" and the Court afterwards adopted the suggestion, and considered that an averment of a *readiness to pay* would have been sufficient as well as an actual tender. Now this averment I consider under the circumstances as tantamount to a tender of the money; for the plaintiffs say they were ready to pay for the malt, but the defendant refused to deliver it. If these parties had met for the purpose of settling the business, and the plaintiffs had expressed their readiness to pay the price agreed on upon delivery of the malt, but the defendant had not got the malt there to deliver to them, there could have been no necessity for the plaintiffs to make a tender of the money,

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money, because they were not bound to part with it until the defendant was ready to deliver them the malt. Therefore I do not think that this is a defective averment, but that it was sufficient under the circumstances to aver a readiness to pay.

LAWRENCE J. The rule in this case was moved for on the authority of *Morton v. Lamb*; the ground of that determination was, that where a man had agreed for a certain price to deliver corn to another at a certain place within a month, the payment of the money and the delivery of the corn were concurrent acts to be performed at the same time; and that it was not sufficient to enable the plaintiff to maintain an action for damages for the non-delivery of the corn to aver merely that he was ready and willing to receive it. But the Court did not hold it necessary in such a case that the plaintiff should part with his money into the other's hands, and then endeavour to get the corn as he could. I alluded there to some cases in order to shew that the plaintiff must state in his declaration that he was ready to do every thing that was required on his part to be done; but I did not mean to say, nor was the attention of the Court called to it, that that averment was to be made in any particular form. In the case before the Court there was no averment whatever of the kind. It is urged that this is after verdict, and that it is sufficient that there is an allegation of the fact of a readiness to do that which was required of the plaintiff; and to be sure if it were necessary to resort to that, so much strictness in the manner of pleading a fact is not necessary after verdict as on demurrer. But since this rule was obtained I have looked more particularly into the precedents to see in what manner averments of this sort have been made; and I have

have found one in particular in *Plowd.* 180. on which probably the pleader who drew this declaration had his eye. The case is that, of *Norwood v. Norwood and Read*, executors of *Gray*; wherein the plaintiff declares that in consideration that he had paid the testator in his lifetime 40*s.* he promised to deliver to the plaintiff at *Ramsgate* 60 quarters of wheat in certain proportions and for a given price to be paid immediately after the delivery of the same. The declaration then avers that *Gray*, though often requested to deliver the corn, and though the plaintiff at the several times aforesaid when the wheat should have been delivered was ready at *Ramsgate* to receive it, and to pay to *Gray* the several sums which he ought to pay immediately after the said receipts of the wheat, hath not delivered, but the same to deliver to the plaintiff hath wholly refused, &c. And upon demurrer the plaintiff had judgment. There indeed the only question made was, how far the executors were liable? but it was never questioned but that supposing they were liable the form of the declaration was good. There are similar precedents to be found in *Hearne's Pleader*, 131. and in *Clift.* 97. It appears therefore upon the whole, that this form of declaration agrees with the current of authorities; that it is not impeached by the case of *Morton v. Lamb*, on the authority of which the question was brought forward, and that it is warranted by the precedents I have quoted.

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LE BLANC J. According to the cases which have been determined on this question neither of the parties was bound to do the first act or to perform his part of the agreement before the other. If so, then neither can be bound to state that in pleading which is equivalent to per-

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performance. Now a tender and refusal has always been deemed to be equivalent to performance; therefore as performance in this case was not necessary, neither was it necessary to aver that which was equivalent to it. But all that is required of the plaintiffs to shew is, that they did every thing which they were bound in fact to do. Then if they shew that they were ready to pay the price provided the defendant were ready to deliver the malt, that is all that was necessary for them to do, and consequently their pleading a readiness to perform is equivalent to every thing that they were bound to perform where the defendant refused to perform his part. Therefore I consider this averment sufficient; and that it must be taken after verdict that they had the money ready to have paid it if the defendant had been ready to perform his part.

Rule discharged.

Saturday,
Jan. 31st.

TAYLOR against EASTWOOD.

In trespass for taking and driving the plaintiff's cattle, to which there was a justification that the defendant was lawfully possessed of a certain close, and that he took the cattle there damage-feasant, the plaintiff may specially reply title in another, by whose command he entered, &c., and it does not vitiate the replication that it unnecessarily proceeded farther to give colour to the defendant.

TRESPASS for chasing the plaintiff's cattle and driving them from their feed, and another count for seizing and driving them away. Pleas, 1st, Not guilty. 2^d, That the defendant was seised in fee of a close called *the Croft*, situate in the parish of *Huddersfield* in the county of *York*, and because the plaintiff's cattle were damage feasant there he justifies driving them out. 3^d, That before and at the time when, &c. the defendant was and still is lawfully possessed of and in a certain other close called *the Croft*, situate, &c. and then justifies for the like cause as before. Replication to the first special plea, *de injuriâ suâ propriâ absque*, &c. traversing the defendant's seisin in fee. Replication to the last plea, that before the said time

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time when, &c., and before the said defendant any thing had or claimed to have in the said close called *the Croft*, one *Ann F.* now deceased was seised in fee of the said close, and being so seised afterwards intermarried with one *T. M.*, by virtue whereof the said *T. M.* and *Ann* became seised in fee of the said close, &c. and afterwards had issue one *A. F. M.* That *Ann* (the wife) afterwards, and before the said time when, &c. to wit, on, &c. died seised, leaving the said *A. F. M.* her son and heir and the said *T. M.* her surviving, upon the death of which said *Ann* the said *T. M.* began ~~to be~~ was seised of the said close in which, ~~and~~ in his demesne as of freehold for his life as tenant thereof by the curtesy, and being so seised thereof he the said plaintiff a little before the said time when, &c. to wit, on, &c. as servant of the said *T. M.* and by his command and for his use entered into the said close in which, &c. and put therein the said cattle, &c., and the same cattle remained and continued therein until the said defendant afterwards, to wit, on, &c. claiming title to the said close in which, &c. under colour of a certain charter of demise made to him thereof by the said *T. M.* before the said time when, &c. (whereas nothing in the said close in which, &c. passed to the said defendant by virtue of the said charter of demise,) of his own wrong at the said time when, &c. chased, &c. the said cattle in manner and form, &c. and this he is ready to verify, &c. and then the plaintiff new assigns other trespasses. Rejoinder, de injuriâ, &c. and traversing the seisin of *A. F.*; and as to the trespasses new assigned, not guilty. The issues being all found for the plaintiff, a motion was made last term in arrest of judgment, because the replication to the second plea was no answer to it, and was in itself informal.

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Law and Lambe, in shewing cause against the rule, admitted that the replication to the second plea was more circuitous than it need have been, and that the common replication *de injuriâ suâ propriâ*, &c. would have been sufficient; but they contended that this was tantamount to it. The question is, Whether when possession is set up as a defence to an action of trespass for chasing the plaintiff's cattle, the plaintiff can by pleading shew a title in another person, and justify entering for his use? It cannot be doubted that the facts stated in the replication might be shewn in evidence under the common replication. The distinction was taken in an anonymous case, *Salk. 642. Easter, 8 Anne*, by Holt C. J. that in transitory actions possession *primâ facie* imports a good title; but in trespass *quare clausum fregit* it is otherwise (*a*); for there the plaintiff claims the close, and the right may be contested. Now here the defendant by his plea brings into question, the right to the close; and it was competent to the plaintiff in answer to the plea of lawful possession in the defendant to shew a title in another and a right of entry for his use. Where one is seised in fee, an entry for his use vests the possession immediately in him. *Bro. Abr. Seisin, pl. 50*. It seems to have been taken for granted in *Scarl v. Bunnion* (*b*) that this might be pleaded specially. That was trespass for taking the plaintiff's cattle, to which the defendant pleaded that he was possessed of the close for a term of years then to come, and so justified taking them damage feasant: the plaintiff demurred, because the defendant had not shewn the commencement of his title. The Court held the plea good upon this distinction, that where the matter is collateral to the title of the land, and

(a) *Vide Poll v. Garlick, 2 Lutw. 1489.*

(b) *2 Med. 70.*

for aught appearing in the declaration, the title may not come in question, there such a justification as that will be good. But in effect they admit that title might be replied, for they proceed to say, "In this case no man can tell *what the plaintiff will reply;*" which shews that in the judgment of the Court the plaintiff might have replied specially. If the defendant could have denied any part of the title set forth, and shewed that he had a right to the possession, he might have done so; instead of which he takes issue on *A. F.*'s title which is found against him; by which he ~~pleads~~ that his entry was only under the colour of ~~right~~. It is true that colour was not necessary to be given here, for it is only required where otherwise the plea would amount to the general issue, in order to withdraw it from the judgment of the jury, and submit it as a question of law to the court (a): but that will not vitiate the replication. It only alleges that the defendant entered under colour of a charter of demise, which conferred no title on him, but it does not allege that he was in possession. On the whole, if the facts stated in the replication be true, it is impossible that there can be a lawful possession in the defendant; for the plaintiff entering for the use of one who had title, cannot be dispossessed of his lawful possession by the tortious entry of a stranger; and therefore the replication is a full answer to the plea.

Littleton in support of the rule. The case cited from *Salk.* 642. is in favour of the defendant; for Lord *Holt* there said, "Where the action is transitory, as trespass for taking goods, the plaintiff is foreclosed to pretend a right to the place, nor can it be contested on the evi-

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(a) Vide *Argent v. Durrant*, 8 Term Rep. 406.

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" dence who had the right;" though it was otherwise fit trespass quare clausum fregit. There the declaration and plea were the same as here. Such a replication as the present is new at least, and it is admitted that the common replication *de injuria*, &c. would have been more proper, for that would have put in issue both the title and right of possession. However, admitting that there may be a special replication shewing a title in another, and an entry under him in answer to a plea of lawful possession in the defendant, it may still be objected here that the replication does not shew any right to the ^{present} possession incompatible with what is stated in the plea; for the title may be in one person and the right of possession in another: the replication should have gone on and stated that the party entitled entered *and was in possession*, and then that the defendant afterwards entered under colour, &c.; as was done in *Taunton v. Cesar (a)*, where the bare possession only being put in issue, the Court held that the party who entered under a lawful title could not be treated as a trespasser. But this is an attempt to make one a trespasser who had a lawful possession, and who justifies it against an entry made upon him.

Lord Kenyon C. J. The case in *Salkeld*, which is the only authority cited in support of the objection to this replication, does not come very strongly recommended. For first, it is an anonymous case; and next, what is relied upon as there said was beside the point in judgment. It was rightly decided, that as against a wrong doer the defendant might justify upon his possession, which was admitted by the demurrer; but Lord Holt is made further to

(a) 7 Term R.p. 431.

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say, that which cannot be admitted, that where the action is transitory, as in that case, for taking the cattle, the plaintiff is foreclosed from pretending a right to the place, and that it cannot be contested on the evidence who had the right. What is the good sense of the case? The plaintiff brings an action for an injury done to him in driving away his cattle from the place where they are depastured. The defendant justifies taking them damage feasant in a certain close, of which he states himself to be lawfully possessed. The plaintiff replies, that he has a right to the possession, because such an one has a title to the land, and that he entered as his servant. The defendant denies the title of that person which is found against him. Then the title being in another from whom the plaintiff claims, it was incumbent on the defendant to shew how he had a lawful possession, and that he was not a mere wrong-doer. That he has failed to do, and therefore there is no answer to the action. Possession alone may be pleaded against a wrong-doer, but I cannot conceive how it can avail against the person who has the title to the present possession.

GROSE J. The motion in arrest of judgment was grounded upon the authority of the case in *Salkeld*, which has been sufficiently answered by my Lord. The use of pleading is to put such material facts on the record as may plainly bring the merits of the case into question. The material question here was, Whether the plaintiff had a right to depasture his cattle in a certain close? or in other words, Whether the defendant was justified in driving them out? To shew this the defendant first says, that he was seised in fee of the close, which is found against him. Then he says, that he had a right to the possession. To

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this it is answered, that another person under whom the plaintiff claims was entitled to the land, and that he entered by his authority: issue is taken on the seisin of that person, and that also is found against the defendant: so that both the title and the right of possession is found against the defendant, and consequently his justification fails altogether.

LAWRENCE J. The objection is strictly this, that the plaintiff has stated that on the record ~~which~~ ^{it} was competent to him to have given in evidence under the general replication of *de injuriâ suâ propriâ*, &c. Now unless we are bound by authority to admit the validity of such an objection, it ought not to prevail. The only authority relied on for this purpose is the case referred to in *Salkeld*. Until that case it was vexata questio whether a man could justify taking another's cattle damage feasant without shewing a title to the locus in quo; and many cases may be cited where that question has been agitated (a). The case however in *Salkeld* settled that it was sufficient for a man to justify upon his possession against a wrong-doer: but it does not go the length of shewing that such a justification is good as against the person who has the title to the land, and who makes an entry in pursuance of that title. It may be observed, that that case came before the Court upon demurrer to the plea, and therefore no question could arise as to whether title could be replied to a plea of possession. One may suppose a case in which it would be proper to reply specially; as if there be two tenants in common, and one bring trespass against the other for taking his cattle, to which the defendant pleads

(a) Vide 2 Lutw. 1489. Carib. 9.

that he took them damage feasant. There it seems that the plaintiff ought to reply specially that he was tenant in common with the defendant, and so shew that he was not a trespasser. And at any rate what is supposed to have been said by Lord *Holt* in that case cannot be right to the extent of it; for certainly the plaintiff would not be foreclosed from shewing a right to the place. Then it is objected that the replication proceeds to give colour to the defendant, which it need not have done: but the introduction of unnecessary words of form will not vitiate the rest of the replication, which is good.

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LE BLANC J. We are called upon to deprive the plaintiff of the fruits of his verdict in this case, notwithstanding the title to the land where the cattle were distrained is found for him, and that he entered in pursuance of that title. The only authority which is adduced in support of the rule is the case in *Salkeld*; but that does not go to the extent contended for, that the defendant may justify upon his possession notwithstanding the facts abovementioned found against him. In order to understand that case rightly, we must take the position there laid down by Lord *Holt* with reference to the point before the Court, as it arose upon the pleadings there stated. But it is no authority for a case circumstanced like the present, where the title to the land is found in the plaintiff, and an entry in pursuance of that title.

Rule discharged.

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Tuesday,
Feb. 3d.BIRKLEY and Others *against* PRESGRAVE.

An action upon promises lies by a ship owner to recover from the owner of the cargo his proportion of general average loss incurred by sacrificing the tackle belonging to a ship for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern.

IN assumpsit, the first count alleged that the plaintiffs were owners of the ship *Argo*, with the appurtenances, of the value of 675*l.*, whereof *G. A.* was master, which ship, on the 3d of *November* 1799, was proceeding upon a voyage with a cargo of wheat of the value of 855*l.*; that during the voyage part of the furniture of the ship, of the value of 20*l.* was utterly lost to the plaintiffs, and other part thereof sustained damage to the value of 50*l.*; which loss and damage were occasioned by certain acts of the master and crew of the vessel, properly and necessarily done by them in order to preserve the ship and cargo from perishing by storm. That certain help and assistance were then and there obtained by the master in order to preserve the ship and cargo from so perishing by storm, and were then and there necessary and proper for that purpose, for which the plaintiffs were obliged to pay and did pay 20*l.* That the ship and cargo were, by the means used for the general preservation thereof, preserved from the storm and completed the said voyage. Of all which premises the defendant afterwards had notice. That the defendant was, during the time the wheat was on board the ship as aforesaid, and at the time of the loss, damage, help, and assistance aforesaid, the owner of the wheat, and was and is benefited in respect thereof by the acts of the master and crew, and by the said help and assistance; from all which respectively the loss, damage, and expences accrued. By reason whereof the defendant, as the owner of the wheat, became liable to contribute to the said loss, damage, and expences in a general average; and thereupon

upon in consideration of the premises the defendant promised to pay the plaintiffs so much money as he, as such owner of the wheat, was liable to contribute to the said loss, damage, and expences in a general average when he should be thereunto afterwards requested. And the plaintiffs averred that the defendant, as such owner of the wheat, was liable to contribute to the loss damages and expences, in a general average, the sum of 40*l.* whereof he had afterwards notice. The declaration contained two other counts; the one indebitatus assumpsit for money due and payable for a general average; and the other for money paid, laid out, and expended; with the common breach to the whole. The defendant pleaded non assumpsit.

This cause came on to be tried at the last assizes for *Durham* before *Graham B.* when a verdict was found for the plaintiffs, damages 19*l.* 12*s.* subject to arbitration as to the quantum, and to the opinion of this Court as to the questions of law upon the following case:

The ship *Argo*, the plaintiffs being her owners, on a voyage from *Wysbeach* to *Sunderland*, laden with wheat shipped by the defendant and of which he was the sole owner, as she was entering *Sunderland* harbour with a fair wind and had just passed the lower end of the North Pier, was by the veering of the wind and a sudden and violent squall prevented from proceeding further into the harbour, and the crew were obliged to let go the small bower anchor in order to bring her up. With the assistance of some men who came to her for that purpose in a pilot-boat they fastened the ship, in order to secure and preserve her and the cargo from the storm, and with a warp which they for that purpose got run out and fastened to the South Pier; but the warp was soon broke by
the

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the storm. In order that the anchor might hold, and for the preservation of the ship and cargo, more cable was then borne away, and the ship was permitted to drive alongside the North Pier, to which they made her fast with hawser ends and towing lines, which were proper ropes and such as were usually provided and employed for that purpose. The master cut the cable from the best bower anchor that was then upon the ship's bow, being afraid that another ship would be adrift and come down upon the *Argo*, and being apprehensive that there would not be time enough to undo that cable if the other vessel should happen to drive against his ship; and therewith fastened and moored the *Argo* to the pier; and this he did for the preservation of the ship and cargo. Whilst they were so fastening her with the cable, the other ropes (the hawser ends and towing lines) through the violence of the storm, and by another ship driving against the *Argo*, broke; and if there had been another minute's delay in cutting the cable the ship would have gone adrift and sunk upon the bar at the entrance into the harbour; but she avoided that peril by means of the cutting and using that cable in manner aforesaid. Afterwards the master, for fear the ship should make water and the corn be thereby spoiled, the ship having a hole through her bottom occasioned by another ship running foul of her in the storm, got twelve men to go on board to keep her clear of water, in order that the cargo should not be damaged or spoiled. Half a guinea a-piece was paid by the master for the plaintiffs to those men who went on board for this purpose, they refusing to do so under that sum; and whilst they continued in the ship they were for that purpose employed at the pumps. The damages found by the jury were calculated as the amount of what was payable

to

to the plaintiffs by the defendant, as the owner of the cargo, in respect of the cutting and wear of the cable, the breaking of the warp hawfers and towing ropes, and of the amount of what was paid by the plaintiffs for the services aforesaid to the men who went on board the ship, and of the expence of maintaining them whilst in the ship. The question for the opinion of the Court was, Whether an action can be maintained for the loss, damage, and expences abovementioned, or any, and which of them?

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Holroyd for the plaintiff. Two questions arise on this case; 1. Whether any and which of the losses are within general average? 2. Whether the owner of the ship can recover a contribution from the owner of the cargo for his proportion of expence incurred for the general concern?—1. Admitting that the hawfer ends and towing lines which were broken by the storm are not such a loss as falls within the meaning of general average, because they were only applied to the ordinary purposes for which such things are provided; yet the cable which was cut and sacrificed for the purpose of aiding the others, and thereby appropriated to a different use from what it was originally intended for, and which contributed to the preservation of the ship and cargo, does constitute a charge of general average. So does the money paid to the men who came to the vessel in the pilot-boat, which was for the preservation of the whole concern. In *Dacosta v. Newnham* (a), where a ship was obliged to put into port for the benefit of the whole concern, charges which were incurred there for taking care of the cargo, and even pro-

(a) 2 Term Rep. 407.

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visions for the workmen hired for the repairs of the ship were deemed general average. Now the above-mentioned expences were equally for the benefit of the whole concern in consequence of the storm. And in *Beauves's Lex Merc.* 148. the rule is laid down that whatever expences and losses are voluntarily incurred for the general preservation of the ship and cargo are general average (a). But at any rate there is one article of expence which was incurred solely on account of the cargo, and for which the defendant is solely liable, and that is the amount of what was paid to the men who were employed at the pumps on board the ship in order to prevent the water from damaging the wheat. 2. This action is maintainable for the defendant's proportion of the general average. It is enough to say that such actions have been maintained and verdicts recovered without objection. They fall within the general principle of law, that where any person is bound to make contribution to another the law implies a promise that he will do so; in other words, it is a good consideration for an implied promise. At the common law where contribution was required a writ of contribution issued, precedents of which are to be found in *Fitzh. Na. Br.* (b). This has fallen into disuse, because in most instances as many persons were concerned a more easy remedy was administered in equity. *Bro. Abr.* tit. *Suit and Contribution*, gives several instances where contribution shall be made. So if one surety pay more than his proportion of the debt of the principal he may re-

(a) So, in the same book, folio edition, 149. "In settling a gross average an estimate must be made of all the goods lost and saved, as well as of what the master shall have sacrificed of the ship's appurtenances to her preservation and that of the cargo."

(b) 2d edit. 378.

cover from another the overplus. It may be said that in some cases there will be a difficulty of ascertaining the quantum of contribution in these cases, as where many have an interest in the cargo: But at any rate that difficulty does not exist in this case; and where it is too great to be unravelled at law recourse must be had to a court of equity. In *Dacosta v. Newnham* before mentioned, which was an action against an underwriter, one of the questions which arose was on the quantum of the sum to be recovered, whether certain items constituted general average or not? for if they did he was only liable to pay a proportion; and the Court there entered into the consideration of the quantum. Here the loss being under 20%, the plaintiffs could not have any remedy in equity by reason of the smallness of the demand. At any rate, however, the pay of the twelve men employed for the benefit of the cargo to prevent its being damaged by the water coming in may be recovered under the count for money paid.

Hullock, for the defendant, contended, first, that the action was not maintainable. The circumstance of there being no instance produced of such an action being maintained where the attention of the Court was expressly called to the question is itself a strong argument against it according to *Ashburst J.* in *Le Caux v. Eden (a)*. There is also a good reason why the remedy should be in equity and not at law, in order to prevent a multiplicity of actions: what the interest of each individual was in the cargo could only be ascertained upon a bill filed for a discovery.

2. At any rate none of the losses incurred fall within

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and Others
against
PRELGRAVE.

(a) *Dergl.* 601.

*1801.

—
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general average, being the immediate effects of the storm. In the passage quoted from *Beaumes's Lex Merc.* 148. one of the circumstances stated to be essential to concur to make losses of this sort general average is, that the sacrifice of the ship's furniture should be in consequence of a consultation between the captain, his officers, and crew. Now here the loss was incurred by the sole orders of the master, without any deliberation of the crew, and therefore is a case for which the books do not provide. And there seems reasonable ground for this precaution, in order to prevent fraud.

Lord KENYON C. J. If the law confer a right, it will also confer a remedy. When once the existence of the right is established the Court will adapt a suitable remedy, except under particular circumstances where there are no legal grounds to proceed upon. Here the only difficulty pretended is the ascertainment of the proportion to be paid of the general loss in each particular case; and since it is admitted that this may be ascertained in equity, there seems to be no reason why if it can be ascertained without recourse to equity, an action should not lie to recover it at law. But it is objected, that this will lead to a multiplicity of actions. The same difficulty however must occur in equity. It is not competent in general to file a bill which will conclude the interests of persons not named. There are indeed some excepted cases to that rule; as in the instance of creditors, one of whom may file a bill for himself and the rest of the creditors, seeking an account of the estate of their deceased debtor for payment of their demands (a). But generally speaking, a court of equity

(a) Vide *Mitford's Ch. Pl. ch. 2. s. 2. part 3.*

will not take cognizance of distinct and separate claims of different persons in one suit, though standing in the same relative situation. I have known the attempt sometimes made, where an estate has been contracted to be sold in parcels to many different persons, to file a bill in the names of all of them to compel a specific performance; which has been constantly refused. Bills in equity for a discovery are for the most part auxiliary to proceedings in a court of law: and it does not follow that a court of equity has jurisdiction over the subject matter because it would compel a discovery. Such a proceeding does not change the nature of the jurisdiction over the original matter. The objection therefore arising from multiplicity of actions is of no weight in a case like the present. The same inconvenience would exist if there were many persons owners of different parts of a cargo, and an injury were to happen to the whole from the misconduct of the captain; they must all bring their several actions for their respective losses, and no objection could be made to their recovery. Upon the whole, this action, the grounds and nature of which are fully set out in the special count, is founded in the common principles of justice. A loss is incurred, which the law directs shall be borne by certain persons in their several proportions: where a loss is to be repaired in damages, where else can they be recovered but in the courts of common law; and wherever the law gives a right generally to demand payment of another, it raises an implied promise in that person to pay. With respect to the other question, all ordinary losses and damage sustained by the ship happening immediately from the storm or perils of the sea must be borne by the ship owners. But all those articles which were made use of by the master and crew upon the particular emergency, and out of the usual

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usual course, for the benefit of the whole concern, and the other expences incurred, must be paid proportionably by the defendant as general average. The rule of consulting the crew upon the expediency of such sacrifices is rather founded in prudence in order to avoid dispute, than in necessity: it may often happen that the danger is too urgent to admit of any such deliberation. Here however there can be no difficulty, for it is found in fact that the cutting of the cable which belonged to the ship was done for the benefit of the cargo as well as the ship.

GROSE J. This action is brought to recover a rateable proportion of a certain loss and damage, and expences which have been incurred by the plaintiffs as ship-owners in preventing the owner of the cargo from incurring a loss. That such an action is maintainable I have no doubt. If there be not many instances of the sort to be found, it is probably because the demand has been submitted to without controversy; for I understand that this sort of damage has been continually settled as general average in the city of London. Where there is a right, there must be a remedy; and there can be no other remedy than by action to recover damages. It is true, where there are many owners of the cargo there may be as many actions brought, but that arises from the necessity of the thing; and I should still say, that they are all liable to answer for their respective proportions.

LAWRENCE J. All loss which arises in consequence of extraordinary sacrifices made or expences incurred for the preservation of the ship and cargo come within general average, and must be borne proportionably by all who are
 interested.

interested. Natural justice requires this. Then the only argument against this species of remedy is resolvable into this, that the plaintiff chooses to take a difficulty upon himself in proving the amount of a defendant's interest in the cargo in order to ascertain the proportion which he is bound to pay, instead of having recourse to a Court of Equity, where he can obtain proof of it more easily, and thereby facilitate his remedy. But that objection does not prove that a plaintiff cannot recover in an action whenever he can make out his case without having recourse to the assistance of a Court of Equity.

LE BLANC J. Unless it be shewn by authority that the action does not lie, we must presume that it does, upon the common principle of justice, that where the law gives a right it also gives a remedy.

Postea to the Plaintiffs (a).

(a) Vide *Marshall v. Dutrey*. *Select Cas. of Evid.* 58. S. P.

DOR on the several Demises of HENRY COCK and CHARLES COCK alias HOPKINS against COOPER.

Tuesday,
Feb. 3d.

ON the trial of this ejectment at the last assizes for the county of *Sussex*, to recover certain messuages and lands at *Cowfold* in the said county, a verdict was entered for the plaintiff, subject to the opinion of this Court on the following case.

A devise of a messuage and land to R. C. for the term only of his natural life, and after his decease to the issue of the said R. C. as tenants in common; but in case the said R. C. shall die without leaving issue, then a devise of the same to E. H. in fee; gives to

Henry Cock of Horsham being seised in fee of the premises in question by his will duly executed, dated 19th January 1792, (amongst other things) devised the same in

R. C. an estate-tail in order to effectuate the general intent. And cross remainders cannot be implied between the issue of R. C.

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Dor.
against
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the following words: "Also I give, devise, and bequeath
 " unto *Richard Cock*, son of my sister *Elizabeth Cock* de-
 " ceased, all that messuage or tenement, barns, buildings,
 " farms, and lands, with the appurtenances in *Cowfold* in
 " the county of *Suffex*, to have and to hold unto my said
 " sister's son *Richard Cock* afore said for the term only of
 " his natural life; and after his decease I give and devise
 " the same messuage or tenement, farm, lands, and pre-
 " mises with the appurtenances, unto the lawful issue of
 " the said *Richard Cock*, as tenants in common, to whom
 " I give, devise, and bequeath the same: but in case the
 " said *Richard Cock* shall die without leaving lawful issue,
 " then and in such case, after his decease, I give and de-
 " vise the same messuage or tenement, and farm, with the
 " appurtenances in *Cowfold* unto *Elizabeth Harding*, for-
 " merly *Elizabeth Hewitt*, now wife of *S. Harding* of
 " *Horsham*, and to her heirs and assigns." The testator
Henry Cock died in 1793. *Richard* named in the said de-
 vise entered upon the premises immediately on the death
 of the said devisor, and in the year 1795 suffered a reco-
 very thereof, and conveyed the same in fee to the defendant
William Coper, who is now in possession under that title.
 The said *Richard Cock* died in January 1800, without issue.
Elizabeth Harding, formerly *Hewitt*, in the said will
 named, died in the lifetime of the said *Richard Cock*. The
 said *Henry Cock* (one of the lessors of the plaintiff) is the
 testator's heir at law, and also the heir at law of the said
Elizabeth Harding. The question for the opinion of the
 Court is, whether the said lessor of the plaintiff *Henry*
Cock is entitled to recover in this ejectment.

Pooley for the plaintiff contended, that *Richard Cock* the
 devisee took only an estate for life, and that his issue took

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estates tail as tenants in common, with cross remainders ; and consequently the recovery suffered by the first taker was of no avail. The intent of the testator is express, that *Richard Cock* should take “ for the term *only* of his “ natural life.” And there being no words of inheritance added to the limitation to his issue, they would in the first instance only take estates for lives by implication ; but inasmuch as the remainder over was only to take effect upon the dying of *Richard Cock* without leaving any issue, and as the issue were to take as tenants in common and not in succession, in order to effectuate the intention of the testator cross remainders must be raised between the issue. (Lord *Kenyon* C. J. Is it not a settled rule that cross remainders cannot be implied between more than two? Then here is an estate of inheritance afterwards given to the first taker ; for the remainder over was not to take effect till failure of his issue. But supposing the remainder to the issue to be a contingent remainder, it was put an end to by the destruction of the particular estate on which it depended before the contingency happened). Cross remainders may be raised even between more than two, if it be necessary to give effect to the testator’s intent. The case of *Gilbert v. Witty* (a) has been much shaken since in *Phipard v. Mansfield* (b), and *Twifden v. Locke* (c). It is not necessary, as was said by Lord *Kenyon* in *Doe v. Wainwright* (d) to use any precise form of words in order to give cross remainders : and if the testator’s intention can only be effectuated here by giving an estate of inheritance to the children, it directs in substance cross remainders ; for no otherwise can the entire estate go over to the person in remainder,

(a) *Cro. Jac.* 655.(b) *Corrup.* 797.(c) *Ambl.* 665.(d) 5 *Term Rep.* 430.

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which was the clear intent of the testator, as it is not to go over till the event of *R. C.* dying without leaving issue. It was truly said in *Phipard v. Mansfield* that the intent of testators in general is to raise cross remainders between children; and the courts have been anxious to lay hold of any words in a will to give it that construction. Thus where the devise over was of *all* the testator's said lands after a devise to issue, it was construed to raise cross remainders between the issue; the intent being apparent that no *part* should go over without the rest. *Maynell v. Read* (a), and *Holmes v. Meynell* (b).¹ So where the devise is to children, issue, &c. and if they *all* die without issue then over. *Dy.* 303. *b. pl.* 49. So *here* the devisor gives over the *same* messuage, &c. In *Phipard v. Mansfield* (c), where the devise was to *three* and the heirs of their bodies as tenants in common, and in *default of such issue* to the testator's own right heirs, cross remainders were implied. The like construction prevailed in *Atherton v. Pye* (d). [Lord *Kenyon*. In that case there were words of limitation added to the devise to the daughters; and this forms a principal ground of distinction in these cases.] By the subsequent part of the will there is an estate of inheritance created which is to be coupled either with the express estate for life before given to *Richard Cock*, or with the estate of freehold before raised by implication of law in the issue. Now the testator's intention requires that the estate of the second takers should be enlarged, and there is no rule of law to restrain such a construction. The giving an estate of inheritance by implication of law to the first taker is a mere technical rule of property, which may be controlled according to the doctrine of Lord *Mans-*

(a) *Pollux.* 425.(b) *T. Ray.* 452.(c) *Cooper.* 797.(d) 4 *Term Rep.* 710.

field in *Doe v. Laming* (a) by the apparent intent of the testator to the contrary. It is true that according to this construction the word *issue* must be construed to be a word of purchase in one part and a word of limitation in another part of the will; but there is no objection to that. 2 *Str.* 804. And though Lord *Kenyon* in *Doe v. Applin* (b) seemed to intimate that there was some difficulty in putting a different construction on the same word in different parts of the same will, yet he did not deny that it might be done. (Lord *Kenyon*. Certainly what was there said was only with reference to the particular case before the Court; for no doubt the same word may be used in different senses in a will if the intent to do so be obvious.) Here that intent appears. For by giving the estate to the issue as tenants in common it is evident that he did not intend that they should take by descent from *Richard Cock*; and having before given him an estate for life only, it is plain that where he uses the word *issue* afterwards as a word of inheritance he must have intended it to apply to the estate before given to the issue of *R. C.* as purchasers. Suppose an estate devised to *A.* for life, remainder to the issue of *B.* as tenants in common, and if *B.* die without issue then over; in that case *A.* could not take an estate of inheritance, and therefore such estate must connect itself with the estate before given to the issue of *B.* as purchasers. Suppose here the devise over had been in case *Rd. Cock* should die without leaving *descendants*, he could not have taken an estate-tail. Now no more benefit was intended to *Rd. Cock* in the devise over “in default of his leaving issue” than if he had been a mere stranger. He was only named by way of describ-

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(a) 2 *Burr.* 1100.(b) 4 *Term Rep.* 87

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ing the descendants of the person who were to take before the ultimate remainder took effect, and not by way of making him the stock of succession to future generations; for his children were to take as tenants in common, forming so many distinct stocks. Therefore if the testator meant to create any estate of inheritance by these words it must have been with a view to couple it with the estates for lives before given to the tenants in common. The case of *Doe v. Applin* (a), where the devise was to A. for life, and after his decease *to and amongst his issue*, and in default of issue then over, has been since considered in *Burnsall v. Davy* (b) as going further than any case in giving an estate-tail to the first taker by the rejection of the word *amongst*, and the authority of it has been therefore questioned. And in *Doe d. Candler v. Smith* (c), upon a devise something similar, there was an express estate-tail afterwards given to the first taker.

Marryat contra was stopped by the Court.

LORD KENYON C. J. Cases of this kind have been so much agitated of late, that all the arguments occur readily to one's mind; and after the decisions which we have made we should not be consistent with ourselves if we were not to hold that the first taker took an estate-tail in this case. It has been the settled doctrine of *Westminster Hall* for the last forty or fifty years that there may be a general and a particular intent in a will, and that the latter must give way when the former cannot otherwise be carried into effect. I remember that point much dis-

(a) 4 Term Rep. 32.

(b) 1 Bos & Pull. 221. Vide what was said by Lord Kenyon relative to this opinion in *Doe v. Halley*, 3 Term Rep. 7.

(c) 7 Term Rep. 531.

cussed in the case of *Robinson v. Robinson* (a). I heard it argued the first time before a very great lawyer Sir *Dudley Ryder*, who then presided in this court. A second argument was directed, but he died before it came on. It was argued a second time before Lord *Mansfield*, and the certificate, which was afterwards returned upon the greatest deliberation, is in print. Nothing could be more positive than the words of the will in that case to shew a particular intent that the first taker should take an estate for his life *and no longer*. But there was a general intent apparent, which could not be effected but by giving him an estate-tail, and on that the decision was founded. The case was carried up to the House of Lords while Lord *Hardwicke* sat there, and was much considered by him; and questions were put to the Judges upon it framed by him in every possible shape; and Lord Ch. B. *Parker*, who is known to have been a very strict lawyer, delivered their opinions agreeing with the judgment of this court. The same question came on again to be considered in *Roe d. Dodson v. Grew* (b), in the Court of Common Pleas, and was there much canvassed, and underwent the same determination. Then came on the case of *Doe on the demise of Candler v. Smith*, in the 7 *Term Rep.* 531. in which I thought I could not make the matter more clear than by reading the words of Lord Ch. J. *Willes* in *Roe d. Dodson v. Grew*. I will not go through all the cases again which have been so fully considered in those I have alluded to. Perhaps we should best fulfil the particular intent of the testator in this case by giving *Richd. Cock* only an estate for life; but the general intent was that all his issue should inherit the entire estate before it went over; and

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(a) 1 *Burr.* 38.(b) 2 *Wils.* 323.

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that intent can only be answered by giving him an estate-tail by implication from the subsequent words "in default of his leaving issue." It is suggested that it would answer the same purpose if we were to raise cross remainders by implication between the children of *R. C.* But to do this between more than two without any thing further than what appears here would be directly contrary to former authorities; and it would also be in express contradiction to the rule of law in *Comber v. Hill* (a), that an heir at law shall not be disinherited but by express words or necessary implication, whereas such a construction would operate to disinherit him by a very weak and remote implication.

GROSE J. The only question is, What upon the whole of the will appears to have been the intent of the testator? and this has been truly stated to be that *Richd. Cock* should first take the estate, and after him his children, and that the remainder over should not take effect so long as any of his descendants remained. Then this general intent can only be carried into effect by giving the first taker an estate-tail.

LAWRENCE J. The principal part of the plaintiff's argument is founded upon the raising of cross remainders by implication between the issue of *R. C.*; but it is a settled rule that they shall not be implied between more than two, unless such appears upon the face of the will to have been the intention of the testator: but no such intent appears in this case from the words of the will. Nor can it be implied merely from the circumstance that the remainder over was not to take effect but upon the dying of

R. C. without leaving issue. The case of *Doe d. Candler v. Smith* is very like the present. That was a devise to *A.* for life, remainder to the heirs of the body as tenants in common, and in case *A.* died before 21 or without leaving issue of her body then over: and this was holden to give *A.* an estate-tail. It was very clear in that case that the testator's particular intent was only to give *A.* an estate for life, because the issue were to take as tenants in common, and therefore could not take by descent; yet in order to effectuate the general intent the estate of inheritance implied from the subsequent words was annexed to the prior estate for life given to the first taker. That applies strongly to the limitations in the present case.

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LE BLANC J. I can find no words in the will to raise cross remainders between the issue; and if not we cannot imply them without breaking in upon the settled rule that cross remainders shall not be implied between more than two. Then the general intent of the testator cannot be effectuated without annexing the subsequent estate of inheritance to the estate of the first taker and giving him an estate-tail.

The Mayor, &c. of LONDON against DIAS.

Wednesday,
Feb. 4th.

THE defendant was arrested and holden to bail upon the following affidavit: "*James Byfield*, clerk to "*Richard Clarke* Esquire, Chamberlain of the city of "*London*, maketh oath and faith, that *George Dias* is indebted to the Mayor, &c. of *London* in 224 l. 19 s. 3 d. "*for certain arrears of rent due from the said George Dias* "*to the said Mayor, &c. for the use and occupation of* "*certain parcels of ground,*" &c. concluding in the usual

An affidavit to hold to bail, sworn by a clerk in the Chamberlain of London's office as to the existence of the debt, and that no tender of it had been made in Bank notes to the best of his knowledge and belief, held sufficient in an action brought by the corporation.

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—
The Mayor, &c.
of LONDON
against
DIAS.

usual form with negating a tender of the debt in Bank notes, to the best of his knowledge and belief.

Hovell on a former day obtained a rule nisi for discharging the defendant on common bail for the insufficiency of the affidavit to hold to bail, it having been sworn to by a clerk in the Chamberlain's office instead of by his principal; and because, for aught appeared, a tender in Bank notes may have been made to the Chamberlain, though not within the knowledge of the deponent; and he cited *Cass v. Levy*, 8 Term Rep. 520.

Dampier now shewed cause, stating that this mode of swearing was always allowed where from the nature of the thing the parties themselves could not swear to their own knowledge of the debt. It had been admitted in the cases of executors, assignees of bankrupts, and agents of principals residing abroad, and could not be otherwise in the case of corporate bodies. That the deponent in this case being a clerk in the Chamberlain's office who had the management of all corporation business of this kind, was a more likely person to have a competent knowledge of the facts contained in the affidavit than the Chamberlain himself; and he cited *Munro v. Spinks*, 8 Term Rep. 284. and *Gresswell v. Lovell*, *ib.* 418.

Lord KENYON C. J. This case does not go further in principle than those in which affidavits to hold to bail in this form have been decided to be sufficient. The affidavit must have been made by some of the officers of the corporation; and the Chamberlain himself, who certainly could not know more of the matter than the clerk in his office,
could

could not have sworn in any different manner, or with more certainty than the clerk has done.

Per Curiam,

Rule discharged.

1801.

The Mayor, &c.
of London
against
Dias.

The KING *against* The Inhabitants of MARTHAM. *Wednesday, Feb. 4th.*

TWO justices removed *E. Green, Mary* his wife, and their six children by name, from the parish of *St. Paul* in the city of *Norwich* to that of *Martham* in *Norfolk*. The Sessions on appeal confirmed the order, and stated the following case for the opinion of this Court.

The pauper *E. Green* was legally settled at *Martham*, where he worked as a labourer with his father who was a bricklayer there. In 1782, being then 17 or 18 years of age, he came to the parish of *St. Paul* in *Norwich*, and worked as a labourer with *Chadley* a bricklayer for about six months, when by an agreement made by the pauper's uncles *J. and F. Littleboy* he was clubbed to his said master for three years at the wages of 7 shillings per week for the first year, 8 shillings for the second, and 9 shillings for the third, to learn the trade of a bricklayer, and to do any other work his master might set him about. The above wages were the usual wages of a bricklayer at that time. The pauper was to board, lodge, and wash for himself; and if prevented at any time from working by badness of weather, illness, or from his master not having employment for him, a proportionable deduction was to be made from his week's wages for such loss of time. Occasional deductions of a day or two's labour were made. The pauper sometimes drove his master's cart employed in his business, and sometimes drove his mistress an airing.

A. clubbed with *B.* (which signifies serving another for the purpose of learning a trade) for three years at a certain rate of weekly wages, with a proviso that if he were prevented from working by bad weather, illness, or want of employment, there should be a proportionable deduction of wages; held that *A.* gain a settlement by serving a year under this hiring, though occasional deductions on these accounts were made.

When-

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Whenever he was employed by his master either as a bricklayer or as above stated, no deduction was made from his wages. He continued three years in the employment of his master under the preceding contract. From these circumstances the Sessions considered this as a contract of apprenticeship between the parties, and confirmed the order.

When this case was called on, the Court asked the counsel in support of the order whether it were possible to distinguish this from the case *of K. v. Cottisball (a)*, where a settlement was gained by serving under such a hiring.

Wilson and *Marsb* attempted to distinguish the cases by observing that here was a stipulation in the contract, that in case of illness, bad weather, or want of employment, the pauper was to have no wages: whereas to enable one to gain a settlement by hiring and service, the contract must continue during the whole year. But the necessary construction of this agreement must be, that if the master had no employment for the pauper, or the weather were too bad to admit of his usual work, in which cases he was to have no wages, he should be at liberty to work for any other master. But

The Court thought that this did not sufficiently vary this case from the former; and that if they drew such refined distinctions they should leave the justices below without any rule to guide their determinations.

Both Orders quashed.

Alderfon was to have argued contra.

(a) 5 Term Rep. 193.

1801.

SMITH *against* BURLTON.Thursday,
Feb. 5th.

A Rule was obtained calling on the plaintiff to shew cause why the warrant of attorney given in this cause should not be delivered up to be cancelled, and why the judgment and execution issued thereon should not be set aside, &c. The principal ground made for the rule in the defendant's affidavit was, that being a prisoner in the King's Bench prison, the warrant of attorney was obtained from him by the plaintiff (also in custody in the same prison) by the intervention of another prisoner of the name of *Bland*, who acted as agent or attorney for the plaintiff, no person being present on the part of the defendant at the time when the instrument was executed. It appeared however from a comparison of the several affidavits on shewing cause, (and on which the question at length turned), that the defendant was not at the time in custody at the plaintiff's suit, but at the suit of another person. And it was sworn by *Bland* that he had not acted as attorney for the plaintiff, but had only interfered as a friend to both parties, though originally at the solicitation of the plaintiff.

The rule of Court of the 4th Geo. 2, requiring an attorney to be present on behalf of a prisoner at the time of his executing a warrant of attorney to confess judgment, does not apply to a case where the party was in custody at the time at the suit of a third person.

Marryat for the plaintiff, on shewing cause, contended that the rule of court of the 4 Geo. 2. (a) engrafted on a former rule of the 15 Car. 2. (b), requiring an attorney to be present on the part of a prisoner at the time of executing a warrant of attorney to confess judgment only relates to prisoners in the custody of a sheriff's officer. The words of the latter rule are "sheriff, or other officer," which have

(a) R. and O. of K. R. 9.

(b) See *Tidd's Prac.* 46r.

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always had that construction (a). At any rate, the rule does not apply to cases where the defendant is not in custody at the suit of the party to whom the warrant of attorney is given. *Finn v. Hutchinson* (b), *Holcombe v. Wade* (c), *Churchy v. Roffe* (d), and the same is recognized by Lord Mansfield in *Gillman v. Hill* (e).

Larves in support of the rule said, that as it was not positively sworn that the defendant was in custody at the suit of another person, he had considered that the plaintiff meant to rely on the circumstance of the defendant's assenting that *Bland* should act for himself as well as for the plaintiff; but in *Hutson v. Hutson* (f) this had been deemed not to be sufficient to take the case out of the rule of Court. If however the Court thought that the fact now insisted upon (which he was not prepared to deny) sufficiently appeared upon the affidavits, he could not distinguish this from the cases cited; though he contended that this case fell as much within the principle of the rule of Court, which was intended for the protection of prisoners who could not readily have access to proper advice, as if the defendant had been in custody on mesne process at the suit of the plaintiff himself.

Lord KENYON C. J. I am sorry to find that the weight of authority is with the plaintiff. If this had been res integra I certainly should not have put the same construc-

(a) See *Tidd's Prac.* 463. But the Court will interfere in such cases by virtue of its general authority, though the defendant was in custody of the marshal. *Parkinson v. Coates*, 3 Term Rep. 616.

(b) 2 Ld. Ray. 797.

(c) 3 Burr. 1792.

(d) 5 Mod. 144.

(e) *Corp.* 142.

(f) 7 Term Rep. 7.

tion on the rule of Court of the 4 *Geo.* 2. as appears to have been done by the cases cited. That rule was made in order to protect those who were not in a condition to protect themselves, and therefore I would not have frittered away one word of it. I should rather have said, that it made no difference whether a prisoner were in custody upon mesne process or in execution, or whether at the suit of the plaintiff or of any other person; or whether in charge of the sheriff or any other description of officer. The case indeed in Lord *Raymond* was before the 4 *Geo.* 2.; but as the cases since we followed up the same construction, and mankind have acted upon it for so long, I must acquiesce in the decision however reluctantly.

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 ———
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GROSE J. I am sorry that the rule of Court has been so pared away; but as the case in question has been so expressly determined not to fall within it, we must abide by the decision.

LAWRENCE J. The case of *Hutson v. Hutson* only determined that where a party was within the rule he should not be permitted to waive the benefit of it by any consent at the time. But here the defendant has not brought himself within the rule.

LE BLANC J. of the same opinion.

Rule discharged.

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Thursday,
Feb. 5th.

GRAHAM against PEAT.

One in possession of glebe land under a lease void by the stat. 13 Eliz. c. 20. by reason of the rector's non-residence may yet maintain trespass upon his possession against a wrong-doer.

TRESPASS quare clausum fregit. Plea the general issue, (and certain special pleas not material to the question). At the trial before *Graham B.* at the last assizes at *Carlisle*, the trespass was proved in fact; but it also appeared that the locus in quo was part of the glebe of the rector of the parish of *Workington* in *Cumberland*, which had been demised by the rector to the plaintiff, and that the rector had not been resident within the parish for five years last past, and no sufficient excuse was shewn for his absence. Whereupon it was objected that the action could not be maintained, the lease being absolutely void by the act of the 13 Eliz. c. 20., which enacts, "that no lease of any benefice or ecclesiastical promotion with cure or any part thereof shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice without absence above fourscore days in any one year; but that every such lease immediately upon such absence shall cease and be void." And thereupon the plaintiff was nonsuited.

A rule was obtained in *Michaelmas* term last to shew cause why the nonsuit should not be set aside, upon the ground that the action was maintainable against a wrong-doer upon the plaintiff's possession alone, without shewing any title.

Cockell Serjt., *Park*, and *Wood*, now shewed cause, and insisted that possession was no further sufficient to ground the action even against strangers than as it was *prima facie*

facie evidence of title, and sufficient to warrant a verdict for the plaintiff, if nothing appeared to the contrary. But here it did expressly appear by the plaintiff's own case that his possession was wrongful, for it was a possession in fact against the positive provisions of an act of parliament, without any colour of title even against strangers, 1 *Leon.* 307. He was not even so much as tenant at sufferance; though it is not certain that this latter can maintain trespass (a). It is settled that the plaintiff could not have maintained an ejectment against a stranger who had evicted him (b). It appears from *Plowd.* 546. that there must not only be a possession in fact of land to maintain trespass, but the possession must be lawful at the time. And an instance is given, if the king be seised in fee, and a stranger enter upon him claiming title, and continue in possession a year and a day, yet he cannot maintain trespass against a wrongdoer. And though 5 *Com. Dig.* 537. says that he may, yet the authority cited for it does not warrant the position, and is directly contrary to an adjudged case in 4 *Leon.* 184. (Lord Kenyon. That goes upon artificial reasoning that the king cannot be dispossessed by an intruder, and does not apply to other cases.) Suppose there had been a plea of foil and freehold of the rector, and that the defendant as his servant and by his command entered, &c.; it being settled that there cannot be a traverse to the command (c),

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(a) Vide 5 *Com. Dig.* tit. Trespas, B. 1. where it is said that he may against a stranger, and cites 2 *Roll. Abr.* 551. l. 42. but this latter book lays down the position with "contra 9 H. 6. 43. b. admit."

(b) *Doe d. Crisp v. Barber*, 2 *Term Rep.* 749.

(c) Vide 6 Co. 24. a. and *Salk.* 107. but if both parties claim under the same person the command is traversable, for it would be absurd to traverse a title which both admit. *Gre. Car.* 586.

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the plaintiff must either have traversed its being the title of the rector, or have shewn a legal possession consistent therewith, as that he had a lease from him; and then it would have been shewn in answer that the lease was void by the statute; and either way there must have been judgment against the plaintiff. Now it was equally competent to the defendant to avail himself of this upon the general issue.

Law, Christian, and Holroyd contra were stopped by the Court.

LORD KENYON C. J. There is no doubt but that the plaintiff's possession in this case was sufficient to maintain trespass against a wrong-doer; and if he could not have maintained an ejectment upon such a demise, it is because that is a fictitious remedy founded upon title. Any possession is a legal possession against a wrong-doer. Suppose a burglary committed in the dwelling-house of such an one, must it not be laid to be his dwelling-house notwithstanding the defect of his title under the statute.

Per Curiam,

Rule absolute (a).

(a) "Whoever is in possession may maintain an action of trespass against a wrong-doer to his possession." *Harker v. Birbeck*, 3 *Burr.* 1563. So *Cary v. Holt*, 2 *Stra.* 1238. "Trespass is a possessory action founded merely on the possession, and it is not at all necessary that the right should come in question." *Lambert v. Strother*, *Willes' Rep.* 221.

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The KING *against* The Inhabitants of HOUGHTON
LE SPRING.

Friday,
Feb. 6th.

TWO justices by an order removed *George Haswell* from the township of *South Shields* to the township of *Houghton le Spring*, both in the county of *Durham*. The sessions on appeal confirmed the order, subject to the opinion of this Court on the following case.

A pauper, having a freehold estate in the parish of *A.* in the occupation of a tenant to whom he had let it, was deemed to gain a settlement by residing thereon 40 days with the licence of his tenant for the purpose of making some repairs, such residence being considered as equivalent to a residence in any other part of the parish.

The pauper *G. Haswell* acquired a settlement by apprenticeship with one *Gally* a mason in the township of *Houghton le Spring*. Shortly after the expiration of his apprenticeship he became entitled as heir at law to his cousin *M. W.* to three copyhold houses, let at 6*l.* a-year, and one freehold house at *Sedgfield* in the county of *Durham*. Upon his becoming so entitled he agreed to let and did let to one *Robert Wood* the freehold house at 3*l.* per annum, the pauper undertaking at the same time to sink a cellar and make some repairs in the premises. *Wood* accordingly entered and occupied the premises as a public house. The pauper in pursuance of his agreement after such possession by *Wood* went from *Houghton* (where he lodged with his father) to *Sedgfield*, for the sole purpose of sinking the cellar and making the repairs agreed upon. He was occupied in such work for upwards of forty days, during the whole of which time he resided as a lodger in *Wood's* house. After finishing the work he returned to his father's. During the whole of the pauper's living at *Sedgfield* on the occasion aforesaid the copyhold houses were in mortgage to the said *Robert Wood* for 40*l.* The pauper continued in the receipt of the rents of the whole

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of the premises for several years, and then sold the same for 130*l*.

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Holroyd and Hullock, in support of the order of sessions, contended that the pauper who was once settled in *Houghton le Spring* did not acquire a subsequent settlement in *Sedgely* by residence in the parish where he had an estate of his own in the occupation of another. 1st, The residence itself in the parish was occasional and accidental only, being for the special purpose of repairing the house which he had let to *Wood*. He did not reside there in his own right, but merely by the licence of *Wood* and as his servant; which is not sufficient to confer a settlement; as was holden in *R. v. Catherington (a)*, where a mortgagor, who was permitted by the mortgagee in possession to reside in the house for the purpose of overlooking some repairs which he proposed to make on the mortgaged estate with an intent to sell the same and pay off the mortgage, was adjudged not to have gained a settlement by such residence; although it is clear that the mortgagor in possession has such an interest as will confer a settlement by residence on his estate for forty days. It did not indeed appear there whether or not there were any surplus after payment of the mortgage money; but nothing turned on that point. The utmost therefore that can be collected from the facts here stated is, that the pauper resided in fact in the same parish in which his estate was situated. But, 2^{dly}, that has never been deemed sufficient to confer a settlement, unless the owner was in the actual possession of it. It was indeed long doubted whether residence in the same parish where a party had property in his occu-

(a) 5 Term Rep. 771.

pation were sufficient to confer a settlement unless he also resided upon it; that point however was settled in the affirmative in *R. v. Sowton (a)*: but the doubt could never have arisen if it had been considered to be immaterial whether or not the owner were in possession. The reason of the determination, that a person could not be removed from his own estate, was because it would be a disseisin of him from his freehold: but that can only apply where he is in the actual occupation of it at the time; for otherwise it is no disseisin of him to remove him from any other property than his own. One who has leased his estate, as in this instance, has no more right to reside on it than a stranger. In order to gain a settlement by being irremovable from a tenement of 10*l.* yearly value, the party, though he need not reside on the estate provided he reside in the same parish, must stand in the relation of tenant to the premises; otherwise as Lord *Kenyon* observed in *R. v. South Lynn (b)*, every lodger or servant would gain a settlement. If this be sufficient, two persons may gain settlements in respect of the same property, though not more in value than 10*l.* a-year, the one as tenant, the other as landlord (*c*). But though the particular point in judgment does not appear to have been expressly adjudged, there are several dicta in the books which shew that it has been considered that a person may be removed from a parish wherein he had property if he were not in the oc-

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(a) *Burr. S. C.* 125.(b) 5 *Term Rep* 664.

(c) See the case of *Llandverras v. Northop*, *Burr. S. C.* 571. where it appears this may be done even in the case of an underletting, provided the part underlet be of the annual value of 10*l.* But there the original tenant still continued to reside on a small part of the premises of the annual value of 40*l.*

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cupation of it himself. In *R. v. Dunchurch* (a), (which was the case of a purchase under 30 *l.*) the pauper had at first resided in her own house, from whence she afterwards removed to another part of the same parish, and let the house to her son, under the idea that while she continued to live on her own freehold she could not be removed. There Lord *Mansfield* said, "as to removing a person from their own, she became an object of removal *as soon as she had let it to her son.*" In another report of the same case (b), *Wilmot J.* says, "undoubtedly she might be removed from the parish, *not residing in the house which was her own* (c)." (Lord *Kenysn.* That being a purchase under 30 *l.*, the act of the 9 *Geo. 1. c. 7.* intervened, which provides that the purchaser shall continue irremovable no longer than while he *shall inhabit in such estate.* And a distinction has always been taken in that respect between the cases where the property came to the party by his own act or by operation of law.) In *R. v. Sowton* (d), which was not a case within the statute, it must be understood that the party was in possession of his property; for it was said by Lord *C. J. Lee*, "it appears that he came to *Sylbury* to make it *his home and habitation.*" Besides which, the general expression, which runs through all this class of cases, that a party shall not be removed *from his own estate*, seems to imply that he must

(a) *Burr. S. C.* 553.(b) 1 *Blac. Rep.* 598.

(c) Opposite the passage in question in the margin is this abstract: "A pauper may be removed from a parish in which she has a freehold, not living therein." Whether this were written by the learned judge himself does not appear. The work was published by his executors; but see the preface, p. 28.

(d) *Burr. S. C.* 128. There is a fuller note of this case in *Andr.* 345.

be in the possession of it, though he need not actually reside thereon.

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Ward contra, in answer to the cases cited, observed that in *R. v. Catherington* the mortgagee was in possession, and there did not appear to be any surplus on which the interest of the mortgagor could attach; therefore, as Lord *Kenyon* observed, the latter had neither *jus in re* nor *ad rem*. That case turned on another of *R. v. St. Michael's, Bath* (a), which was considered as the case of an insolvent who had conveyed all his interest in the property to trustees for sale and payment of his debts, without a probability of any surplus; and the possession of which property he afterwards fraudulently obtained. Whereas here the pauper had a substantial freehold interest in the parish where he resided, and an undisputed residue in the copyhold premises. In *R. v. Sowton* the party did not reside on his estate, but continued at an alehouse in the same parish for more than forty days, as a traveller or guest; and yet it was ruled that he gained a settlement. As to the case of *R. v. Dunchurch* an answer has been already given. He then contended, 1st, that a man cannot be removed from his freehold or other estate devolved on him by operation of law, whatsoever the value may be. The reason is given by *Foster J.* in *R. v. Aylthrop Rooding* (b), because by magna charta "none shall be disseised of his freehold." 2^{dly}, A residence in a parish for 40 days irremovable will gain a settlement where it is to be derived from property, unless in the excepted case of residence upon a purchase under 30 *l.*, by the stat. 9 G. 1. c. 7. 3^{dly}, It is not necessary to reside on the identical estate of the party; but it

(a) Doug'l. 630. Cold. 110.

(b) Burr. S. C. 414.

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is sufficient if he reside in the same parish. *Ryship v. Harrow* (a); *Sowton v. Sydbury* (b); *R. v. St. Nyotts* (c); and *R. v. Hasfield* (d). *Atbly*, It is not necessary for the purpose of gaining a settlement in these cases that the owner should actually occupy his estate; it is sufficient to reside in the parish where he has a freehold. Here indeed the residence was in fact upon the pauper's own property; but though that were admitted to have been with the licence of *Wood* only, yet it is at least equivalent to residence in any other part of the parish. In most of the cases it is true that the occupation went along with the title, but in some of them that does not distinctly appear, and the fact may have been otherwise. In *Ryship v. Harrow* Lord Holt's language is general, that "living in a parish where "one has land will give a settlement." It is not qualified by saying that it is necessary to reside on it. He also adds, "the law takes notice of freeholders as those who choose "members of parliament and are jurors." It is then to be considered what is a freeholder; and occupation not being necessary to give him a vote, in order to make the allusion apply it cannot be necessary to confer a settlement. From the report of the case of *Wookey v. Hinton Blewet* (e) it is competent to argue that a pauper may be sent to a parish in which he has land, though in the occupation of another: at any rate no stress was laid on the circumstance of occupation. The same observation arises upon the language made use of by the Court in *Burdear v. Eastwoodhay* (f); and on the words of the act of 9 Geo. 1. c. 7. s. 5. where it is enacted that no person shall acquire any settlement by virtue of any purchase of "any estate or

(a) *Salk.* 524.(b) *Burr. S. C.* 128.(c) *Ib.* 133.(d) *Ib.* 147.(e) 1 *Str.* 476.(f) *Ib.* 163.

"*interest*" in any parish, &c. the consideration of which was less than 30*l*. If occupation had been considered as essentially necessary, the word *interest* would not have been used. But the case of *R. v. Hasfield (a)* is in point. There an infant eight years old was removed from *Tirley* to *Hasfield*: and it appeared that on the death of his parents a year and a half before he became seised in fee by descent of an estate at *Tirley*; and he and an infant sister, "being in the said parish of *Tirley* with their grandmother "their nearest relation above 40 days," were removed from thence to *Hasfield*, where their father was settled at the time of his death. Lord C. J. *Lee* made a difference between the case of the two children. He said, "*Benjamin* "is seised in fee of an estate in *Tirley*, and it is not material quo animo he came into that parish, or how long he has been in it: it is not a case within the 13 & 14 *Car. 2. c. 12.*, because having an estate of his own in the parish, he is not removeable from it." In *Sowton v. Sydbury* "the difficulty was upon the residence of 40 days in a place where the man was to gain a settlement in respect of his freehold. But I think it clear that "*Benjamin could not be removed from his freehold.*" *Probyn* and *Chapple J.* "concurred that *Benjamin* could not "be removed from the parish where he had a freehold." Now it is plain from the language of the Court that the point of residence upon the property was put entirely out of the question. Besides it is impossible to consider that a child of such tender years could be in the actual possession of the property; and it is probable that the grandmother did not reside upon his estate.

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(a) *Burr. S. C. 145*:

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Lord KENYON C. J. The case last cited has relieved me from any further difficulty. When I first read the case before us, I had a full conviction on my mind that it was a decided point that residence for forty days in a parish in which the party had a freehold estate would confer a settlement there, whether he resided on the estate or not, or whether or not he were in the occupation of it. The cases which were at first cited distressed me considerably, because it was argued that there was no authority in point, and that in all the cases which had been determined in favour of the settlement being gained the fact of the occupation by the pauper occurred, and that the reasoning of the Judges in those cases shewed that it was a necessary ingredient in the judgment. It seemed to me however to be a most extraordinary proposition to establish, that a man might be removed from a parish in which he had property, perhaps to a considerable amount, but whether more or less in such a case is unimportant, because he has let it out; and that if he afterwards come there again he was liable to be treated as a vagrant. A man though not in the actual occupation of his own estate may have many reasons for wishing to live in the neighbourhood of it. He is entitled to the privilege of superintending it. But according to the doctrine contended for, he may be sent to another part of the kingdom, if his settlement happen to be there. There are instances of whole townships belonging to the same person, the whole of which may be in lease; and if the landlord were to reside in the house of any of his tenants, can it be imagined that he would be liable to be removed by an order of justices? I was sure that the contrary had been decided; and I have a MS. note of the case cited, though I could not recall it at once to my memory.

mory. Even in the absence of any express authority upon the subject I should have formed the same opinion, and I am sure the current of opinions has gone that way. However I am glad to be relieved from all difficulty by the case which has been cited. There the child residing with his grandmother cannot be taken to have been in the actual occupation of the property; nor did the judgment of the Court proceed upon any such ground. This is not a case falling within the act of the 9 Geo. 1. like some of the cases cited, which as I before observed are excepted out of the general rule by the very words of the act.

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GROSE J. The general impression on my mind has been, that if a party resided in the same parish where he had property, whether he resided on it or not, he gained a settlement: but I am not aware that my attention was ever before particularly pointed to the distinction between a legal and an actual possession of such property. Here indeed the pauper was corporally resident upon the property; but I consider that the possession was, properly speaking, in the lessee. Now by distinguishing this case out of the general rule, we are splitting the rule unnecessarily, so as to make it more difficult for the magistrates below to act upon it. That the rule itself is large enough to include this case appears from the passage cited from the case of *Ryall v. Harrow*, as said by Lord Holt, and also from the opinion of the Judges in *R. v. St. Nyott's*, particularly what was said by the three Judges who agreed in opinion with Lord C. J. Lee, that if a man “*have lands of inheritance in the parish*” it is not necessary that the residence “*should be upon the lands; it is enough if he reside in the parish.*” They do not say, “*if he have lands of inheritance in possession in the parish,*” &c. In addition

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to these is the case of *R. v. Hasfield*, upon which very proper comments have been made. The reason assigned by Lord C. J. *Lee* why the boy was not removeable within the statute of *Car. 2.* is, "because he had an estate of his own in the parish:" he does not say, an estate in his possession or occupation. Upon the whole therefore I would rather abide by the general rule than qualify it with the exception now contended for, which does not seem to be grounded in the opinions of our predecessors. And therefore I am of opinion that a settlement was gained in *Sedgfield*.

LAWRENCE J. I must own I have great doubts upon this subject. If I thought that the rule had been once settled so as embrace the point before us, whichever way the decision had been I would on no account disturb it. I have always conceived the rule to be, that where a man is in the occupation of an estate of whatever value which came to him by operation of law, he may gain a settlement by residing in the same parish for forty days: but I cannot find any case where if he parted with the possession the same rule has prevailed. On the contrary, the reasoning of the Judges in the several cases referred to seems rather to go the other way. In *Ryall v. Harrow* (a) Lord Holt assigns as a reason for the rule which has been mentioned, that "the act of *Car. 2.* never meant to banish men from the enjoyment of their own lands;" which only applies to a case of actual occupation. So in the case alluded to of *R. v. Aylthrop Rooding* (b), the reason assigned by *Foster J.* why a man should not be removed from his own is "because none shall be dispossessed of his freehold." But how is he

(a) *Salk.* 524.(b) *Burr.* S. C. 414.*dispossessed*

disseised by the removal if he had before let it to another? He loses no right which he before enjoyed; he is still entitled to receive his rents the same as before, and he could have had no more if he had remained in the same parish. If however the last case mentioned of *R. v. Hasfield* had decided the point, I should have abided by it: but it does not appear upon the statement of the case that the grandmother was not living at the time in the house of the infant, and therefore she might be considered as having a possession for the infant, which would be the same thing for this purpose as his actual possession. It is difficult to say how far the argument may be carried. A man may have a legal title and yet be out of possession: would it be contended that in such a case he might gain a settlement by forty days residence in the same parish? Would the same rule extend to the case of one who has a reversionary interest? Upon the whole, not thinking that the cases have hitherto gone further than to give a settlement to one who is *in possession* of his own estate, I have great doubts how far the rule ought to be extended further. Here I cannot consider the pauper as being in possession of the premises at the time. He was merely permitted to reside there for a special purpose by the licence of the tenant, who might have turned him out at a moment's warning.

LE BLANC J. This is a new question of which I also have great doubts, and should like to have further time for consideration. There are expressions which have a contrary tendency to each other in the very same case, and coming from the same Judge. For in *Ryyslip v. Harrow* Lord Holt is first made to say, that the law takes notice of *freeholders*, &c.; from whence it is to be inferred that he thought that residence in a parish where a man had a *freehold*,

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freehold, though not in possession, would confer a settlement. But when he had before said that the statute never meant to banish men from the *enjoyment* of their own lands, it seems as if he were speaking merely of persons in possession of their own property. It cannot therefore be collected with any certainty how the fact stood in that case. So in the case of *R. v. Hasfield* it does not appear whether the boy, though too young to be in the actual possession himself, were not resident with his grandmother upon his own property. If so, it leaves the question as it was before. As to the circumstances of the present case, I consider it to be the same as if the pauper had lodged at any other public house within the parish, and not in that of which he was the landlord; for it is stated that he had before agreed to let it to *Wood*, and that *Wood* had actually entered and occupied the premises, and that the pauper afterwards resided there as a *lodger* in *Wood's* house. He had therefore no right of possession, and *Wood* might have turned him out whenever he pleased. This therefore must be considered as a case where the party had property in the parish, but that he did not reside on it, and that another was in possession of it. And that brings it to the true question Whether such a one can gain a settlement by residing for 40 days in the same parish. At first I thought the question had been decided by the cases of *R. v. Savuton* and *R. v. St. Nytt's*, but upon looking more narrowly into them I find there are circumstances of doubt whether the party were not in possession of the property. Perhaps on looking further into the cases, and particularly into that of *R. v. Hasfield*, we may find something decisive to direct our judgments. But if it should be found to be altogether a new question, the inclination of my opinion is, that a person who has not the possession but only

the property of an estate, and a right to receive the rents, is not irremovable from the parish where such estate is situated.

Cur. adv. vult.

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On this day (the former opinions having been delivered two days before), Lord *Kenyon* C. J. said, that the Court had looked more particularly into the case of *R. v. Haffield*, and they were now all of opinion upon the authority of that case (a), which governed the present, that the settlement was in *Sedgfield*.

Both Orders quashed.

(a) In the report of the same case in 2 *Str.* 1132. it is stated that the order was quashed as to the boy; for as to him he was tenant in fee of the 4*l.* per annum; and though it was not stated that he was actually on that spot, yet it was enough that he had such an estate in the parish from which he could not be removed. It is also to be collected from a MS. note of the late Mr. *Masterman* that the boy was not living on his estate. It also appears that the settlement of the same pauper was afterwards disputed again between *Ryship* and *Heندن* parishes, 5 *Mod.* 416., and the principal question was, Whether *Ryship* was concluded by the former order? but incidentally it rests was laid on the circumstance of this pauper having a freehold at *Heندن*. *Holt* C. J. says, "Let a man be settled where he will, we are all of opinion he may go and live where he has an estate, and therefore that he might have gone to the place where he had a freehold."

WOOD & UXOR against BARON.

Friday,
Feb. 6th

THE Master of the Rolls directed the following case to be made for the opinion of this Court.

Thomas Loue deceased being seised in fee-simple of divers messuages, lands, and hereditaments in *Hindley* in

"to her and her children or her issue for ever. And if it should so happen that *A.* should die leaving no child or children, or *A.*'s children should die without issue," then over: held, that *A.* took an estate-tail.

Under a devise to
A. of all the testa-
tor's whole estate
and effects real
and personal, &c.
"who shall hold
"and enjoy the
"same as a place
"of inheritance
"to her and her children or her issue for ever. And if it should so happen that *A.* should die leaving no child or children, or *A.*'s children should die without issue," then over: held, that *A.* took an estate-tail.

Lancashire,

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 against
 Baron.

Lancashire, on the 1st of *June* 1793, by his will duly made and executed, devised in the following words: " I give and bequeath to my loving wife *Anne Lowe* now living with me all my whole estate and effects real and personal whatsoever, to have, hold, and enjoy the same during her natural life, if she so long remain my widow, but if she should marry again, then she shall have 50 shillings a-year, to be paid to her from and out of my real and personal estate during her natural life by my executors hereinafter named; then from and after the death of my aforesaid wife *Ann Lowe* I give and bequeath to my daughter *Ann*, the wife of *Joseph Wood*, all my whole estate and effects real and personal and whatsoever thereunto belongeth, and also all my household goods and furniture whatsoever and wheresoever, who shall hold and enjoy the same as a place of inheritance to her and her children or her issue for ever. And if it should so happen that my daughter *Ann* should die leaving no child or children, or if it so happen my daughter *Ann's* children should die without issue, then I order and direct that all my houses and lands, and also all my household goods and furniture, and all my other effects whatsoever shall be sold, and the money arising therefrom shall be divided in manner and form following; first, my nephew *John Bitbell* of *Hindley* or his descendants, and *James Lucas* of *Aspiel* or his descendants, shall have the full sum of 100*l.* that is 50*l.* each. Then I give to the two sons of *Eleanor Baron* five shillings each, and likewise to *Margaret* the daughter of *Alexander Lucas* the sum of five shillings, and likewise to *Joseph Wood* the sum of five shillings; and the remainder of the money shall be divided amongst my nephew *John Bitbell*, and *Sibil* the
 " wife

" wife of *James Platt*, and *Betty* the wife of *Richard Ashton*, and *Ann* the wife of *Robert Harrison*, or their descendants, and likewise *James Lucas* aforesaid, and *Eleanor* the wife of *James Baron*, and *Betty* the wife of *Lambert Ainscough*, or their descendants, which shall be equally divided amongst them share and share alike; and lastly, I nominate my wife *Ann Lowe* and my nephew *John Bithell* and *Alexander Winnard* my lawful executors."

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BARON.

The testator died soon after the making of his said will, without altering or revoking the same, leaving his widow *Ann Lowe* and his daughter *Ann Wood* him surviving. The testator's widow is since dead. At the time the testator made his said will, and at the time of his death, his daughter *Ann Wood* had one child only, which is now living; but she has since had several other children, all of whom are also now in being. The defendant purchased from the plaintiffs a part of the lands devised to the plaintiff *Ann*; and a bill was filed by the plaintiffs against him to compel a specific performance. The defendant by his answer offered to perform his part and pay the purchase-money, if the Court should be of opinion that the plaintiff *Ann Wood* could make a good title. The question for the opinion of the Court was, Whether under the will of the testator *Thomas Lowe* his daughter the said *Ann Wood* took an estate-tail or an estate for life only in the devised premises?

Holroyd for the plaintiff contended, that *Ann Wood* took an estate-tail, and consequently that by her and her husband suffering a recovery they could make a good title.

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For though according to *Wild's* case (a) if there be a devise to one and his issue or children, and he then have issue living, the issue will take immediately, unless there be a manifest intent to the contrary to be collected from the whole will; yet that only holds where the estate is given to the children by express words; whereas here the gift is to *Ann Wood* alone, "*who shall enjoy the same as a place of inheritance to her and her children,*" &c. There is therefore an express estate of inheritance given to her. Besides which the general intent of the testator would be defeated if the children took any estate; for as there are no cross remainders given, and they cannot be raised by implication between more than two, the remainder over would take effect on the death of any of them in disherison of the rest of *Ann Wood's* issue. He also referred to *Doe v. Applin* (b), and *Doe v. Smith* (c), to shew that a particular must yield to a general intent where both cannot stand together.

Mauley, contra, insisted that this case fell expressly within the rule laid down in *Wild's* case, that if a man devise land to *A.* and to his children and issue, and he have then issue, the issue shall take a joint estate for life with *A.* (Lord *Kenyon* observed, that there were other words here; namely, that *Ann Wood* should enjoy the estate as an inheritance to her and her children or issue for ever.) If those words were construed to give *Ann Wood* a fee, it would make the limitation which follows an executory devise. (Lord *Kenyon*. As an executory devise it would be too remote, being after an indefinite failure of issue.) It is merely after failure of issue of the first taker, and

(a) 6 Co. 16.

(b) 4 Term Rep. 321

(c) 7 Term Rep. 531.

therefore

therefore not too remote ; for in one event it is, “ if *Ann* “ should die leaving no child or children.” In *Porter v. Bradley* (a) the devise was “ to one and his heirs and assigns “ for ever,” and if he die leaving no issue behind him, then over ; and there the limitation over was holden good by way of executory devise. So in *Roe v. Jeffery* (b), after a devise to *T. F.* in fee the testator added, “ and in case *T. F.* “ should depart this life and leave no issue, then to *E. M.* “ and *S.*, or the survivor or survivors of them share and share “ alike.” This latter was holden a good executory devise.

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 WOOD & UTZ,
 against
 BARON.

LORD KENYON C. J. In cases of this sort one spells as it were every word in order to get at the real intention of the testator. In *Porter v. Bradley* the words were, “ leaving no issue behind him.” In *Roe v. Jeffery* the words were, “ in case he should depart and leave no issue,” and the limitation over was of estates for lives to persons then in esse. These circumstances shewed that the testators in the respective instances meant to confine the limitations over to the event of a dying without issue at the time of the death of the first taker. But it is a general uncontrollable rule, that that which may take place as a remainder shall never take place as an executory devise : and at present it appears to me that *Ann Wood* took an estate-tail : however, we will consider the case, and certify our opinion.

Afterwards the following certificate was sent to the Master of the Rolls :

This case has been argued before us by counsel ; we have considered it, and are of opinion, that under the

(a) 3 Term Rep. 143.

(b) 7 Term Rep. 589.

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against
Baron.

will of the testator *Thomas Lowe*, his daughter *Ann Wood* took an estate tail in the premises devised to her by the said will.

16th Feb. 1801.

KENYON.

N. GROSE.

S. LAWRENCE.

S. LE BLANC.

Friday,
Feb. 6th.

GOODTITLE on the demise of *GEORGE SWEET* against
JOHN BIDLAKE HERRING, *JOSEPH HORNEBROOK*, and *JOHN HITTOW*.

Under a devise to *A.* for her natural life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs male of the body of *A.* to be begotten, severally, successively, and in remainder one after another according to seniority, &c. the elder of such sons and the heir male of his body being always preferred before the younger of such son and sons and the heirs male of their bodies, and in default of such issue, to the daughter and daughters of the body of *A.* as tenants in common in tail, remainder over; held *A.* only took an estate for life, and that the words *heirs male of her body* were explained by the subsequent words to mean first and other sons.

THIS was an ejectment for certain manors, messuages, and land lying in the parishes of *Egglekerry North* and *South Petherwyn*, and several other parishes in the county of *Cornwall*, under a demise laid on the 28th of *May* 1800. At the trial before *Thomson B.* at the last assizes at *Bodmin* a special verdict was found, stating in substance, that *Elizabeth Long* at the time of making her will and at her death was seised in fee of the demised premises, which she became entitled to on the death of her late brother *John Spaccot Long*; and being so seised, on the 11th of *December* 1763 made her last will in writing of that date, duly executed and attested to pass lands, whereby she devised as follows: As for and concerning all manors, messuages, tenements, lands, hereditaments, and premises, advowsons, &c. and rights of patronage whatsoever and wheresoever, whereof she should be possessed or entitled unto at the time of her decease, situate, lying, and being in the several counties of *Devon*, *Cornwall*, the

county

county of the city of *Exeter* or elsewhere, she gave and devised the same, with all and singular their each and every of their rights, members, hereditaments, and appurtenances whatsoever unto *Oliver Baron* and *George Sweet* (the lessor of the plaintiff) and their heirs, for and upon the several uses and trusts thereafter limited and declared, (viz.) To the use of and in trust for her sister *Margaret* the wife of *C. Davie* and her assigns during her natural life, without impeachment of waste, remainder to the same trustees to preserve contingent remainders; and from and after her decease, then to the use of and in trust for the heirs male of the body of the said *Margaret Davie* to be begotten, severally, successively, and in remainder one after another as they and every of them should be in seniority of age and priority of birth, the elder of such sons and the heirs male of his body lawfully issuing being always preferred, and to take before the younger of such son and sons and the heirs male of his and their body and bodies; and for want and in default of such issue then to the use of and in trust for all and every the daughter and daughters of the body of the said *Margaret Davie* to be begotten, to be equally divided amongst them, if more than one, share and share alike, to take as tenants in common and not as joint-tenants, and of the several and respective heirs of the body and bodies of such daughter and daughters; and in default of such issue then to the use of and in trust for her cousin the said *George Sweet* and his assigns for and during the term of his natural life without impeachment of waste, and from and after the determination of that estate then to the use and behoof of him the said *Oliver Baron* and his heirs during the natural life of the said *George Sweet*, upon trust to preserve contingent remainders; and from and after the decease of the said

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George Sweet then to the use of and in trust for the heirs male of the body of the said *George Sweet* to be begotten, severally, successively, and in remainder one after another as they and every of them should be in seniority of age and priority of birth, the elder of such sons and the heirs male of his body lawfully issuing being always preferred before the younger of such son and sons and the heirs male of his and their body and bodies; and for want and in default of such issue, then to the use of and in trust for all and every the daughter and daughters of the body of the said *George Sweet* to be begotten, to be equally divided amongst them (if more than one) share and share alike, as tenants in common and not as joint-tenants, and of the several and respective heirs of the body and bodies of such daughter and daughters; and in default of such issue then to the use and behoof of the right heirs of her the said *Elizabeth Long* for ever, and to and for no other use, end, intent, or purpose whatsoever.

On the 26th of *June* 1769 the testatrix died, whereupon *Margaret Davie* entered and was seised, &c. On the 1st of *January* 1775 *Charles Davie* died, leaving *Margaret* his wife the devisee him surviving, who by indentures of lease and release of the 5th and 6th of *December* 1775 made a tenant to the præcipe and suffered a common recovery, and afterwards by her will dated 20th of *October* 1786, duly executed and attested to pass lands, devised the premises in question to the defendant *John Bidlake* in fee; and afterwards died on the 16th of *May* 1799 without ever having had any issue; after whose death *Bidlake* entered and was seised, and in *Hilary* term 40 *Geo.* 3. levied a fine with proclamations; and after such fine levied, and within five years after the death of *Margaret Davie*,

Davie, and within one year before the commencement of this suit, *George Sweet* the lessor of the plaintiff (*Oliver Baron* being then dead) entered upon the premises and ejected the said *John Bidlake*, and demised the same, &c.

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againſt
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Tripp for the lessor of the plaintiff insisted that *Margaret Davie* took only an estate for life, with remainder to her children as purchasers. Plain words giving an estate tail will indeed prevail, unless there be a plain intent only to give an estate for life. Now here is an express limitation of the estate in strict settlement. First, there is an express estate to her for life, then to trustees to preserve contingent remainders; then indeed there is a limitation to the heirs male of her body, but the testatrix in the same sentence proceeds to point out what heirs male, namely, sons in succession, the elder of such sons, &c. to be preferred; and therefore designating them as purchasers to take in their own right, and not by descent from their mother. Besides, if the limitation to the heirs male of the body of *Margaret Davie* is to give her an estate tail, the subsequent limitation to the daughters must be obliterated; for it cannot be contended that those words would give her an estate in *tail general*, but only in *tail male*. And even if she took an estate in tail general, the daughters would take in a different way from what the testatrix designed; for she has directed them to take as tenants in common, which they would not otherwise do, but as coparceners. He also cited *Lowe* or *Laru v. Davis* (a) as in point: that was a devise to *B.* and his heirs lawfully begotten, viz. the first, second, and every other son successively lawfully to be begotten, and the heirs of the body of such first, second, and every other son, &c. according to seniority;

(a) 2 *Ld. Ray.* 1561. 2 *Str.* 249. & *Fitzg.* 112.

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and in default of such issue, to the devisor's own right heirs. There it was holden that the latter words explained the former, and that *B.* took only an estate for life and not in tail. That case was even stronger than the present; for there was no express estate for life given to *B.* as in this case to *M. D.* So in *Ginger v. White* (a) the devise was to *A.* for life, remainder to the male children of *A.* in succession and their heirs, and in default of such male children to the female children and their heirs, and in case *A.* died without issue, then over; and held that *A.* took only an estate for life. And there Lord C. J. *Willes* speaking of *Legatt v. Sewell* (b), which he observes was the only case which had the least resemblance to the contrary, (and from which judgment *Tracy J.* dissented,) says, that there the words were "heirs of the body," which *vi termini* even in a deed would create an estate tail. But he adds, that if the first words had been "issue" or "children," all the Judges were of opinion that *W. Legatt* would only have had an estate for life. And that they went on this rule, that where in the beginning of a will an express estate is given, it shall not be afterwards altered by *implication*, though it may by *express words*. And then he distinguishes that case from *Law v. Davis*, for that in the former there were no express words to alter the estate first given, as there were in *Law v. Davis*. The same reasoning therefore will serve to distinguish this from the case of *Legatt v. Sewell*. Upon that distinction also the case of *Sayer v. Masferran* (c) turned, where the first taker took an estate tail, it being devised to him *and the heirs of his body*, the males having preference and succeeding according to their births; which latter words the Court said expressed no

(a) *Willes*, 318.(b) 2 *Vern.* 551.(c) *Ambl.* 344.

more than what the law directs. But here the legal descent is altered. That case however was decided without adverting to the case of *Ginger v. White*, which though determined before was not published till afterwards.

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Lens Serjt. contrà contended that *Margaret Davie* took an estate tail by the words of the will, and from the general intent of the testatrix. The words used here are materially different from those in *Law v. Davis*. There the testator expressly declared what "heirs lawfully begotten" he meant, "viz. the first, second, and every other son," &c. whereas here the estate is limited to "the heirs male of the body to be begotten severally, successively, and in remainder one after another," &c. which is no more than the law would have done. It is true that words used in their usual legal acceptance in the first part of a will may be controlled by subsequent words, and the whole will must be read together; but then the intention of the testator to control the former words must be manifest and express. Now "heirs of the body" are words peculiarly appropriated to carry an estate-tail, and they have never been construed to be words of purchase unless such an intent has been positively expressed. If the subsequent words, "the elder of such sons, &c. being always to be preferred to the younger of such son and sons," &c. must be taken to mean the son and sons of *Margaret Davie*, as an explanation of what was meant by the antecedent words, "heirs male of the body;" then indeed the case would be governed by *Law v. Davis*; but they do not necessarily import that, and must rather be taken to mean son and sons in succession at all times during the continuance of the male descendants of *Margaret Davie*. [Lord Kenyon. Words of purchase cannot be

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be applied to the second generation beyond those in esse.] In *Law v. Davis* the explanatory words "son and sons," &c. expressly referred to the sons "of the body of the said Benjamin," the first taker. And so it was in *Ginger v. White*, and *Lisle & Gray (a)*: but here the words "such son and sons," &c. are not expressly said to be son and sons of *Margaret Davie*. Next, the words "severally, successively, and in remainder," &c. do not stand in the way of construing this to be an estate tail in the first taker, as was holden in *Jones v. Morgan (b)*. [Lord Kenyon. There were no superadded words of limitation in that case to the devise to the heirs male. I argued the case.] But it shews that those words alone will not prevent an estate tail going to the first taker. *Sayer v. Masterman (c)* is to the same effect. In *Ginger v. White* the devise was to the *male children* of the first taker in succession, which word *children* is naturally a word of purchase: but here the devise is to the *heirs male of the body*, which are naturally words of limitation. Then the subsequent limitation to the daughters is objected as inconsistent with this construction: but if the general intent will best be effectuated by giving *Margaret Davie* an estate in tail male, the particular intent must give way. That difficulty however may be gotten rid of in two ways, either by *Margaret Davie* taking an estate in tail general, or by her taking an estate in tail male, with remainder in tail general to her daughters. And though the devise to the daughters might thereby lapse in the event of their dying before it vested, yet that would be better than cutting off the succession of any of the heirs male of *Margaret Davie* who were intended to be preferred, which would be the case if the

(a) 2 L.v. 223. Pollex. 582. (b) 1 Bro. Cb. Cas. 206. (c) Amb. 344.

eldest son died, leaving a son in the lifetime of the testatrix. Neither is there any provision made in the will for the daughters of *M. D.*'s sons. Upon the whole, although there are inconveniences both ways, yet by giving her an estate tail the general intent may be better effectuated, according to the doctrine in *Roe d. Dodson v. Grew* (a), which was, that the remainder over should not take effect till failure of the issue of *M. D.*

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Tripp, in reply, observed that the cases of *Roe v. Grew*, *Robinson v. Robinson*, *Doe v. Applin*, and others of the same class, only shew, that where there is a manifest intent upon the whole will that all the issue of the first taker should take before the estate went over, and there were no words to effectuate that intent without giving an estate tail to the first taker, that construction should prevail: but here there are sufficient words to carry the apparent intent into effect, without having recourse to such an artificial construction. No satisfactory answer has been given to the objection, that the limitation to the daughters will be struck out of the will by giving *M. D.* an estate in tail male, (for there is no pretence for her taking an estate in tail general). And this case is even stronger in that respect for letting all the limitations stand than *Law v. Davis*; for there the heirs general might have come in notwithstanding the first taker had an estate tail; but here the daughters will be excluded by such a construction. It would be a new and unnatural construction to give the ancestor an estate in tail male, with a subsequent limitation to the daughters as purchasers: and unless the testatrix had so positively expressed it, the Court

(a) 2 Will. 322.

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would not imply such an intention. Here the eldest son of *M. D.* was so described, because not being in esse he could not be otherwise designated. It plainly was not the intent of the testatrix to enable *M. D.* to destroy all the subsequent limitations to the objects of her bounty.

Lord KENYON C. J. I have not the smallest doubt upon this case. The intention is most obvious to give the first taker only an estate for life; but if that intention could not be carried into effect without shaking a positive rule of law I should certainly bow to the decisions. The case of *Colson v. Colson* (a) went on that ground; and so afterwards did *Perryn v. Blake* (b), in the Exchequer-chamber; where the Judges thought that after the rule of law in *Shelley's* case had governed so many subsequent decisions, however imperfect in itself as a rule for construing the intention of a testator, it was necessary to abide by it. That rule, however, is only established to the extent in which it is to be found in *Shelley's* case (c) to this effect, that if an estate of freehold be given to a man, and either mediately or immediately in any part of the same instrument an estate is limited to the heirs of his body, the latter limitation will unite with the former, and give him an estate-tail. But it never has been decided that those words might not be otherwise explained in the will by the testator himself. They were so explained in *Lowe v. Davis*. There the question was, Whether the words "heirs lawfully to be begotten" could not be explained by the subsequent words to mean heirs of a certain description? In other words, Whether the testator could not say "by heirs lawfully to be begotten I mean the first and other sons successively," &c. of the first taker. Of

(a) 2 Atk. 246.

(b) 4 Burr. 2581.

(c) 1 Co. 104 b.

this there could be no doubt. In former times indeed greater strictness was attributed to the meaning of the words "heirs of the body." The estate which was the subject of dispute in the case of *Larv v. Davis* came afterwards to a gentleman who was not perfectly satisfied with the decision, and would have it canvassed again. His doubts were founded upon an old opinion which he had discovered of Lord *Holt's*, that the words "heirs of the body" were so positive to give an estate-tail to the first taker that they could not be gotten rid of by subsequent words. That opinion I have seen; but it was certainly too straight-laced a construction: and nobody has ever since doubted but that the case of *Larv v. Davis* was rightly decided. That case, however, if it wanted confirmation, has been fortified by the subsequent decision in *Doe d. Long v. Laming*, (of which his lordship read a note of Mr. *Filmer's*, taken, as he said, more accurately than that by Sir *James Burrow*.) The Court there clearly thought that the subsequent words "as well females as males" shewed that the testator meant the words "heirs of the body," &c. to be words of description of the persons whom he intended should next take, and not words of limitation. I well remember the case of *Jones v. Morgan*. There were words of limitation superadded to the devise to the heirs male, which has been always holden to be of great weight in cases of this sort. The decision in this case, however, is principally governed by the case of *Larv v. Davis*, and *Doe v. Laming*, which fortifies it. It is unnecessary to go through all the other cases. *Bagshaw v. Spencer* establishes the same principle. *Lisle v. Gray* is stronger still, because it was a construction on a deed. Also *Coulson v. Coulson*, and other cases might be mentioned. All conspire to shew that *Margaret Davie*

took

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took only an estate for life, and not in tail. If it had come within the principle of the case of *Roe d. Dodson v. Grew*, where a particular intent could not by law take effect consistently with other parts of the will, we must have gone cypres and given effect to the general intent: but that class of cases does not apply to the present.

GROSE J. The only question is, Whether the words "heirs male of the body of *M. D.*" &c. can by the subsequent words be explained to be used as words of purchase? That must be determined by considering what the intent of the testatrix was, and whether such intent can be effectuated within settled rules of law. The intent is most obvious that *M. D.* the mother should only take a life-estate; it is so declared in express terms. Nevertheless, if it were shewn to be inconsistent with the whole plan of the will that she should take no greater estate, there are subsequent words large enough to have given her an estate-tail: but here it is consistent with the whole will that the words "heirs male of the body," &c. should be restrained by what follows. The case of *Law v. Davis* is rather stronger than the present, and at least justifies us in holding that the words "heirs male of the body" may be restrained to mean words of purchase. Here too there are words of limitation added to the devise to the heirs male, &c. which has always been considered as a strong ingredient in cases of this sort. The case of *Law v. Davis* is supported by that of *Doe v. Laming*; and to these may be added *Bagshaw v. Spencer* (a), which I think goes the whole length of the present case. Therefore I think we are fully warranted in giving effect to the intention by

(a) 1 *Ves.* 142.

deciding that *Margaret Davis* took only an estate for life.

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GOOD TITLE
again
HERRING.

LAWRENCE J. The question is, Whether "heirs male" of the body of *Margaret Davis* is descriptive of the persons whom the testatrix afterwards calls "son or sons?" Of the intention there can be no doubt. She first gives *M. D.* an express estate for life, without impeachment of waste, then to trustees to preserve contingent remainders, then after *M. D.*'s decease to the heirs male of her body to be begotten severally, successively, and in remainder one after another, &c. All this was unnecessary if the testatrix meant to give *M. D.* an estate-tail. But then she goes on, "the elder of *such sons* and the heirs male of his body to be preferred before the younger of *such son and sons*;" evidently meaning the same persons whom she had before described as heirs male of the body of *M. D.* Therefore this falls directly within the case of *Law v. Davis*; and is the same as if the testatrix had said "by *heirs male of the body* I mean the eldest and other son and sons of "*M. D.*;" and if she had said so in as many words it cannot be questioned but that the former words must have had that construction put upon them. Now the words made use of are in effect the same. Then the testatrix proceeds to give an estate to the *daughters* of *M. D.* in the same manner. That also shews that by the words "*such son or sons*" she meant the same persons whom she had before described as the heirs male of *M. D.* For she first provides for the sons and then for the daughters of the first taker. It is no answer to say that by this construction, if the eldest son of *M. D.* had died in the lifetime of the testatrix leaving a son the devise would have lapsed,

and

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and the grandson been disinherited; for if the obvious meaning of the will be that *M. D.* should only take for life, we cannot enlarge that estate in order to prevent a possible inconvenience.

LE BLANC J. There is no rule of law to prevent the words "heirs male of the body" from being words of purchase, if they are clearly so intended to be. Now here the testatrix expressly says, "*such son and sons*," plainly referring to the same persons she had before described as *heirs male of the body*, &c. and pointing out what estate they were to take. And having provided for the sons she proceeds to provide for the *daughters* of *M. D.*, which confirms the construction put upon the former words. Therefore I am clearly of opinion that *Margaret Davie* took only an estate for life, and that the sons took as purchasers.

Friday,
Feb. 6th.

LOWNDES against LOWNDES.

Application to
set aside awards,
though for ob-
jections appear-
ing on the
face of them,
must be made
within the time
limited by the
9 & 10 W. 3.
c. 15.

A Rule was obtained to shew cause why an award should not be set aside for defects appearing upon the face of the award itself; against which

Erskine now shewed cause, and objected to the court entering into the consideration of the defects stated upon the award, because the application had not been made within the time limited by the stat. 9 & 10 W. 3. c. 15. which was before the last day of the term next after the award shall be made and published; and more than that period had now elapsed.

Gibbs,

Gibbs, in support of the rule, said that that limitation only applied where the award was impeached on the ground of corruption or undue practice, which was matter extrinsic to the award itself, and not where the objection appeared upon the face of it. Besides, the award having been made a rule of court gave the court jurisdiction over it independent of that statute. That the reason for making the present application was, because the parties were litigating upon the subject matter in the Court of Chancery, and it was thought that the award might be considered as conclusive unless it were set aside, although plainly defective.

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against
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The Court were of opinion that the application came too late after the period limited by the statute; and

LAWRENCE J. added, that in *Pedley v. Goddard* (a) the distinction was taken, that if the party in whose favour the award was made applied for an attachment for non-performance, it was competent to the other to enter into legal objections appearing upon the face of the award, even after the period limited by the stat. 9 & 10 W. 3. But it was there taken for granted, that no application could be entertained for setting it aside, however voidable on the face of it, unless the party applied in time. And the reason why it was permitted to make the objection in the former case was, because upon a motion for an attachment the party would be without remedy if the attachment were granted, notwithstanding the illegality of the award; whereas if the party were left to his remedy by bringing his action on the award, it would be compe-

(a) 7 Term Rep. 73.

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tent to the defendant to take advantage of any illegality appearing upon the face of it.

Rule discharged (a).

(a) Vide *Zachary v. Shepherd*, 2 *Term Rep.* 781. where the like construction was put on the stat. of 9 & 10 *W.* 3. though there were no charge of corruption or undue practice, but that the award was made on insufficient materials.

Saturday,
Feb. 7th.

The KING against EDWARDS.

A conviction on the stat. 5 *Geo.* 3. c. 14 for fishing without consent of the owner "in part of a certain stream which runneth between *B.* in the parish of *A.* in the county of *W.* and *C.* in the same parish and county," quashed, because it did not appear that the intermediate course of the stream between the two termini in which the offence was alleged to be committed was in the county of *W.* and within the jurisdiction of the convicting magistrate.

THE following conviction was removed into this court by certiorari:

Warwickshire. Be it remembered, that on the 27th of May, 40 *Geo.* 3. at *Aston* in the county of *Warwick*, *Thomas Chattock* of, &c. came before me the Rev. *B. S.* one of the justices assigned to keep the peace in and for the said county of *W.* &c. and upon oath, &c. gave me to understand, that on the 25th of May last past defendant did fish with a net in a certain river or stream called *Tame*, in that part of the said river or stream which runneth between *Bromford Forge* in the parish of *Aston* in the county of *Warwick*, and *Castle Bromwich* in the said parish of *Aston* in the said county; of the fishery of which part of the said river or stream Lord *Bradford* and *H. Legge Esq.* then and there were owners, with an intent and attempt then and there to take, kill, and destroy the fish in the said river or stream so situated as aforesaid, against the form of the statute, &c. and without the consent of the said Lord *B.* and *H. L.*, or either of them, then and there owners of that part of the fishery of the said river or stream; he the defendant not then and there having any just right or claim

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to take, kill, or carry away any of the fish in that part of the said river or stream, or any just right to attempt to take, kill, or destroy any fish in that part of the said river or stream so situated as aforesaid, the said part of the said river or stream aforesaid wherein the said fish were so intended and attempted to be taken, killed, and carried away by the defendant not being then and there in any park or paddock, or in any garden, orchard, or yard adjoining or belonging to any dwelling house, but in other inclosed grounds then and there being private property; and that the said Lord B. and H. L. then and there were the true and lawful owners of that part of the said river and stream, and of the fishery thereof; and that the same is their private property; and that the defendant had not then and there their licence and consent, or the licence and consent of either of them. And whereas the said defendant after having been duly summoned in this behalf to appear before me the said justice this 30th of *May* instant, &c. at *Asen* aforesaid, in the county aforesaid, and appeareth and is present in order to make his defence against the said charge contained in the said information, and having heard the same read, is asked by me the justice if he can say any thing for himself why he the defendant should not be convicted of the offence charged upon him in form aforesaid, who pleadeth and saith he is not guilty of the said offence; nevertheless on the said 30th *May* instant, &c. at, &c. *J. F.* a credible witness cometh in his proper person before me the same justice, and upon his oath, &c. deposeth and saith, that on the 25th of *May* last past, in the year aforesaid, he saw the defendant with one *W. S.* drawing a draught net in the said river or stream called *Taine*, which runneth between *Bromford Forge* in the parish of *Asen* in the county of *Warwick*, and *Castle Bromwich*

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in the said parish of *Aston* in the said county of *Warwick* aforesaid, to take, kill, or destroy the fish, or attempt to take, kill, or destroy the fish in the said part of the said river or stream; and that the said part of the river or stream is not in any park or paddock, garden, orchard, or yard adjoining or belonging to any dwelling house, but in other inclosed grounds then and there being private property; and that Lord *B.* and *H. L.* are the true and lawful owners of the fishery of the said part of the said river or stream; and that the defendant had not then and there the licence and consent of the said Lord *B.* and *H. L.*, or either of them, to take, kill, or destroy, or attempt to take, kill, or destroy the fish in the said part of the said river or stream; and that he the defendant had not then and there any just right or claim to take, kill, or carry away any of the fish in that part of the said river or stream so situated as aforesaid, or any just right or claim to attempt to take, kill, or destroy any of the fish in that part of the said river or stream so situated as aforesaid. It is therefore by me the said justice upon the evidence of the said *J. F.* adjudged, that the defendant is guilty of the said offence, and that he the said defendant be, and he is hereby convicted of the said offence, according to the form of the statute aforesaid; and I the justice do award and adjudge, that for the offence aforesaid he the defendant hath forfeited the sum of 5*l.*, to be paid as the statute directs to me the said justice for the use of the said Lord *B.* and *H. L.*, as owners of the fishery of the said river or stream so situated as aforesaid where the said offence was committed.

Clarke took several objections to the conviction. 1. It does not appear that the offence was committed in the county

county of *Warwick*. It is only stated that the defendant fished “ in that part of the river or stream called *Tame* “ which runneth between *Bromford Forge* in the parish of “ *A.* in the county of *W.* and *Castle Bromwich* in the said “ parish of *A.* in the said county.” Non constat but that, though both the termini are in the county of *W.*, yet that the part of the stream running between them in which the defendant fished may be in another county, out of the jurisdiction of the convicting magistrate. Such a circumstance is not unusual. 2. It is not stated that the complaint was made on behalf of the owners of the fishery or by their consent. In *R. v. Corden (a)* a conviction for the same offence was quashed, because it neither appeared to have been made on the complaint of the owner, nor that the fact was done without his consent. Here indeed there is the allegation that it was done *without* the consent of the owners, but it does not appear to have been done *against* their consent; and as the view of the several acts of the 22 & 23 *Car. 2. c. 25. s. 7.*, the 4 & 5 *W. & M. c. 23. s. 5.*, and the 5 *Geo. 3. c. 14. s. 3.* was to make compensation to the owner for the private injury by giving him the penalty, the information can only be laid before the justice by or on behalf of the owner of the fishery, which it is not so stated to be in this instance, and therefore there does not appear to be any jurisdiction in the convicting magistrate to take cognizance of such a complaint by a common informer. By the last-mentioned act the owner has an option either to prosecute before a magistrate for the penalty, or to bring his action for it, which option will be taken away if a third person may elect for him against his consent to lay the information before a

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(a) 4 *Burr.* 2279.

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magistrate. 3. The evidence stated to prove that the fishing was without the consent of the owners ought not to have been received, since no third person could swear positively to that fact. 4. The defendant is charged with having fished in the river "with an intent and attempt "to take, kill, and destroy the fish," &c., and the justice adjudges him guilty of *the offence aforesaid*. Now the stat. of Geo. 3. before mentioned, on which the conviction is founded, makes it an offence to take, kill, or destroy fish, or to attempt to do so. The information therefore in describing the offence ought to have pursued the words of the statute; but neither that nor any other of the statutes on this subject describe the offence as here stated, and it is left uncertain of what offence the defendant is convicted. *R. v. Mallinson (a)*, *R. v. Trelawney (b)*, and *R. v. Salomons (c)*.

Bulgy contra, after attempting to answer the first objection by saying, that the Court would presume that the river was in the same county as the two termini mentioned between which it flowed, and which were stated to be in the county of *Warwick*, was proceeding to answer the other objections; but

The Court said, it was not necessary to enter into the subsequent objections, because the first was decisive. They could not presume that the place where the offence was committed was within the jurisdiction of the convicting magistrate; but it must expressly so appear. Now it did not follow that the intermediate course of the stream was in the same county with the two termini mentioned: the fact was often otherwise.

Conviction quashed,

(a) 1 Burr. 679.

(b) 1 Term Ref. 222.

(c) *Ib.* 249.

1861.

The KING *against* The Inhabitants of ISLINGTON.Saturday,
Feb. 7th.

TWO justices by an order removed *William Oakley*, his wife and children, from the parish of *West Walton* to the parish of *Islington*, both in the county of *Norfolk*. The sessions on appeal confirmed the order, subject to the opinion of this Court, on a case stating, that the pauper being legally settled in the parish of *Islington*, was resident from *Michaelmas* 1794 to *Michaelmas* 1796 in the parish of *West Walton*, in a tenement of the yearly value of 8*l*. By an assessment dated the 25th *August* 1795, for the relief of the poor of the parish of *West Walton* from the preceding *Lady-day* to the following *Michaelmas*, the pauper was assessed in respect of the aforesaid tenement at the rent of 7*l*. a-year, and duly paid the said assessment.

The statute 35 *Geo.* 3. c. 101. s. 4. which provides that after the passing of the act, no person *who shall come* into any parish shall gain a settlement by being rated to any tenement under 10*l*. a year value, extends to persons who were in the parish at the time of the passing the act.

By the stat. 35 *Geo.* 3. c. 101. s. 4. it is enacted, “ that
“ from and after the passing of this act no person or per-
“ sons whatsoever, who *shall come* into any parish, town-
“ ship, or place, shall gain a settlement in such parish, &c.
“ by being charged with and paying his or their share
“ towards the public taxes or levies of the said parish, &c.
“ for and on account or in respect of any tenement not
“ being of the yearly value of 10*l*.”

The question for the opinion of the Court was, Whether the pauper being *resident* in the parish of *West Walton* previous to the 22d of *June* 1795 (the day on which the said act took effect), was enabled to gain a settlement by payment of the rate which was made in the subsequent month of *August* as from the preceding *Lady-day*?

Wood and *Marsh* in support of the order of sessions were stopped by the Court.

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Hulton contra contended shortly, that the statute in question was intended to operate prospectively upon those only who *should come* into any parish *after the passing of the act*; but did not preclude the gaining of a settlement by means of rating and paying, even after the act, by those who were inhabitants of the parish before. This is to be collected from the special wording of the law; and if the legislature had intended to make the operation of it general, they would have enacted that no person after the passing of the act *shall gain* any settlement by being charged, &c. But

Lord KENYON C. J. said, it was very clear that the legislature meant that no person should gain a settlement after the passing of the act by being rated and paying; the words who *shall come* into any parish mean who *shall inhabit* there. It was intended to make an end of this head of settlement law in future (a).

Per Curiam,

Order of Sessions confirmed (b.)

(a) The repelling clause in the 35 Geo. 3. c. 101. adopted the stile of the enacting law of the 3 W. 3. c. 11. f. 6. "If any person *who shall come to* inhabit in any town or parish shall be charged with and pay his share towards the public taxes or levies of the said town or parish, he shall be adjudged to have a legal settlement in the same," &c. The same construction must have prevailed on these words at the time of passing that act as in the present case; otherwise no person previously inhabiting in a parish could have gained a settlement therein by rating and paying, though a new inhabitant might have so done; a distinction which could not have been within the contemplation of the legislature.

(b) There was another case in the paper of *The King against The Inhabitants of Alverthorpe with Thornes* in the West Riding of the county of York, which involved the same question and underwent the same determination.

1801.

The KING *against* The Inhabitants of ST. HELEN
STONEGATE.

Saturday,
Feb. 7th.

TWO justices by an order removed *Thomas Chapman*, his wife and family by name, from the parish of *All Saints Pavebehne* to the parish of *St. Helen Stonegate*, both in the city of *York*. The sessions on appeal confirmed the order, subject to the opinion of this Court on the following case.

The pauper, on the 1st of *January* 1786, was bound apprentice for seven years to *T. Marwman* of *Thirsk*, bricklayer, with the consent of his brother *W. Chapman*, his father and mother being then dead. The pauper continued with *T. Marwman* three years and upwards at *Thirsk*, and then ran away. *W. Chapman* his brother went back with the pauper to *Thirsk* to settle matters between him and his master for resuming the service, which could not be effected; but the pauper was assigned by parol to *W. Chapman*, with whom he afterwards lodged about three years, [except during the absence of a few months with *W. Chapman's* consent,] and in the last two years of that time slept in the parish of *St. Helen Stonegate*. During the time he was with *W. Chapman* the pauper worked under his authority and generally along with him for several masters, [*W. Chapman* being a journeyman bricklayer during the whole term of the indenture]. The pauper's wages were received and applied by *W. Chapman* towards his maintenance, the pauper being bad of sight and earning but little; and among other masters they worked both together for *T. Penneyson* during three months commencing from *November* 1789. About *March*

The pauper, an apprentice, being about to marry, told his master that he wished to provide and work for himself, to which the master consented, and said he might do the best he could for himself; but nothing was said about the indentures, and they were not in fact delivered up or cancelled; the pauper afterwards engaged to work with another master, who told the original master that he had got the pauper at work, to which the original master answered, "I am glad of it, he was a bad lad, and I could make nothing of him;" held this was not such a consent to the particular service as would confer a settlement in the parish where the pauper then lived with the second master.

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1792, the pauper being about to marry applied to *W. Chapman*, and told him he wished to work and provide for himself; to which *W. Chapman* consented, and said he might do the best he could for himself, and did not afterwards consider the pauper as his apprentice; but the indenture was neither delivered up nor cancelled, nor any thing said respecting it. In the same month, and about three quarters of a year before the expiration of the term of the apprenticeship, the pauper applied for work to the said *T. Penneyson*, who employed him in bricklayers' work and paid him weekly wages. About a month after he had so employed the pauper, *T. Penneyson* met with *W. Chapman* and told him he had got his brother at work, to which *W. Chapman* replied, "I am glad of it; he was a bad lad, and I could make nothing of him." The pauper continued to work with *T. Penneyson* for five months after this conversation, and during the last three months of that time slept in the parish of *St. John Delpike in York*; which it was contended on the part of the appellants discharged the prior settlement (if any) in *St. Helen Stonegate*. The indenture was not given up by *W. Chapman* to the pauper till after the time expired, and was produced uncanceled at the hearing of this appeal.

Holroyd, in support of the order of sessions, relied on the case of *Rex v. Crediton (a)* as in point. There the master having before told his apprentice that he had no further employment for him, and he might go where he pleased, was afterwards informed by the apprentice that he was going to one *Underhill*, to which he answered that the apprentice might go there or where he pleased; and this was deemed not to be such a particular consent as would en-

(a) Ante, 59.

able the apprentice to gain a settlement by serving *Under-bill*. This was a mere indiscriminate leave to serve whom the pauper pleased, which is not sufficient in these cases. In *Rex v. Sandford* (a) it was said there must be an express consent of the master to the particular service, and that a mere recommendation was not sufficient; and that where the parties acted under an idea that the indentures were at an end, although they were not in fact delivered up or cancelled, no settlement could be gained as an apprentice under them.

Law contra said, that the consent given here was sufficient within the cases decided. In *Rex v. Bradninch*, T. 21 Geo. 3. (b), the master telling the pauper, that he thought the place he was in a good place for him, and that he hoped he would continue in it, was holden a sufficient assent to the particular service; and so in *Rex v. St. Mary Lambeth* (c), the giving a character of the apprentice to one who applied, though the master had before told her that she was no longer his apprentice, and that she might go and look out for another place; but had not delivered up or cancelled the indentures.

The Court said, that this case was governed by the decision in *Rex v. Crediton*, which was expressly in point.

Order of Sessions confirmed.

(a) 1 Term Rep. 281.

(b) 2 Cr. 594.

(c) *Ib.* 595.

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1801.

Saturday,
Feb. 7th.

The KING *against* The Parish of EDINGTON.

A cottage leased for 99 years determinable on lives, purchased by the pauper's wife before marriage, was in the lifetime of her first husband conveyed by them to a trustee in trust that he should by sale or mortgage raise 10*l.* (for the benefit of the parish by whom the family had been before relieved to that amount) interest and charges, and after payment of the same, in trust to re-assign the premises. The parties always continued in possession; and it did not appear whether the money were ever paid; or what was the value of the cottage. Held that on the death of the first husband, the pauper who married the widow gained a settlement by residing forty days in the cottage of which she had retained the possession.

TWO justices by an order removed *William Bailey*, together with his wife and children, by name, from the parish of *Edington* to the parish of *Urkfont*, both in the county of *Wilts.* The sessions, on appeal, quashed the order, subject to the opinion of this Court on the following case: *Martha Merritt* spinster being in possession of a cottage in *Edington*, which had been granted to one *Clement Whiting* by lease for a term of 99 years originally determinable on three lives, of whom one only was living, purchased a reversionary interest in the cottage for a further term of 99 years to commence at the determination of the first term, but determinable with the lives of herself and her brother *H. Merritt*; and a lease in reversion was accordingly made to her. *Martha* having married one *William Darling*, by indenture of the 7th of July 1776, made between *W.* and *M. Darling* of the one part, and *J. Price* of *Edington* of the other, after reciting the said lease, and that *W. Darling* was indebted to the officers of *Edington* in 10*l.* and upwards for monies paid, laid out, and expended in the maintenance of *Martha* the wife, and the children of the said *W. Darling*, and that it was agreed to make a security of the said premises to *Price* as a trustee for the parishioners for the payment of the said 10*l.* and interest; it was witnessed that for securing the 10*l.* and interest the said *W.* and *M. Darling*, for the considerations therein mentioned, did assign to *Price* the cottage and premises, in trust that *Price* should by sale or mortgage of the said premises and by the receipt of the rents and profits thereof, or by some or one of those ways and

and means, raise the said 10*l.* and interest thereof, together with such costs and charges as should attend raising the same, and after payment of the said sum of 10*l.* and such costs and charges as aforesaid in trust to re-assign the said premises to the said *W. and M. Darling* or one of them, or such other person as should be entitled to the premises, or such parts thereof as should not be sold, applied, or otherwise disposed of. *W. Darling* died leaving *Martha* his widow, who afterwards married the pauper, then settled in *Urchfont*. *Martha* and her first husband in his lifetime, [and after his death and her second marriage, and also after the death of the surviving life named in the first lease, she with the pauper her second husband, for the space of four years] continued in the occupation of the cottage and premises to the time of her death, and the pauper continued to pay the lord his quit-rent during his possession *, and at different times repaired the premises, but particularly at one time expended the sum of eighteen shillings; but it did not appear whether the lord had any knowledge of the assignment. The sessions decided that there was an equitable estate in the said cottage in *Martha* the wife of the pauper *Wm. Bailey* at the time of their marriage, and that by reason thereof, and by their subsequent residence thereon for more than 40 days, the pauper gained a settlement in *Edington*.

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Lens Serjt. and *Casberd* in support of the order of sessions. Considering that the conveyance to *Price* was made so long ago as twenty-five years, that the trustee never entered upon the possession, and that nothing was done upon it, but that the parties continued to enjoy the pre-

* It was said at the bar that the interest had since determined.

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wifes in the same manner as before, and that they had a right to do so till the trustee thought proper to turn them out; there was at least a possessory right remaining in them which was never divested. After such a length of time, it would not now be competent to the trustee to make an entry: for the object of the trust has failed, and cannot now be executed; as the class of persons to whom payment must now be made are altogether changed by lapse of time from those for whose benefit the trust was created. But at any rate, as the trust was created for a particular purpose to secure the payment of 10 *l.* to the parish, the reversionary interest after that purpose was answered, although the present legal estate were in the trustee, would be sufficient to confer the settlement. The value indeed of the property is not stated, but in all probability it must have exceeded 10 *l.*; and after so many years it must now be presumed that the debt was satisfied, and consequently the trustee became seised for the sole use of the parties conveying, or that he had re-assigned to them in virtue of the clause in the conveyance. And the conclusion drawn by the sessions shews that in their opinion there was a resulting reversionary interest: and that is also to be collected from the last clause in the deed. Nor is the amount of the purchase-money material, being made by the wife before marriage, and the husband coming to it by act of law (a). It may be argued that this being originally a chattel interest in the wife, it passed to the first husband on the marriage, and that she could not convey afterwards to a second husband. [Lord *Kenyon* said, there was no pretence for such an objection.] At any rate there was a sufficient interest in the husband to gain a settlement by the residence on the property, which he actually held in

(a) *R. v. Ilmington, Burr.* S. C. 566.

right of his wife. In *R. v. Offchurch* (a) a husband was deemed to gain a settlement by residing on an estate vested in trustees for the separate use of the wife. In *Roper v. Ratcliffe* (b), where lands were devised to be sold in trust first to pay debts and legacies, and then to pay the surplus to J. S. a papist; he was holden incapable to take under such devise by virtue of the stat. 11 & 12 W. 3. c. 4., inasmuch as it was a profit arising out of land, and the devisee by laying down the money might prevent the sale. So in *R. v. Wivelingham* (c) residence for forty days on a property so devised by one who was entitled to a share of the surplus when sold was holden to confer a settlement. And the same point was ruled in *R. v. Rutland* (d). The only case which can be cited on the other side, which appears at first sight to bear against this, is *R. v. St. Michael's, Bath* (e). There the pauper had conveyed to trustees to pay debts; but it expressly appeared that there was no residue, the value of the property not being sufficient to discharge the debts. Besides, there the trustees had entered into possession, and the pauper afterwards got into possession again by fraud. But it was clearly admitted that a mortgagor continuing in possession with the assent of the mortgagee had such an equitable interest as would gain him a settlement.

Jekyll and *Read* contra admitted that an equitable interest in property on which the owner resides was in some cases sufficient to confer a settlement; but insisted that in this case the whole interest was out of the pauper's wife. The parish having relieved the first husband's family were

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(a) 3 Term Rep. 114.

(b) 2 P. Wms. 5. 9 Mod. 167. 181,

(c) Dougl. 767. (d) Burr. S. C. 793. (e) Doug. 630. and Cald. 110.

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entitled to take possession of the property, and the conveyance was made for the purpose of reimbursing them by a sale of it. It was uncertain whether there would be any residue; and therefore it falls directly within the case of *St. Michael's Bath*. Lord Mansfield there said, the pauper had only a chance of a residue, and had no right to continue a moment in possession. It is true that fraud was an ingredient in the case; but it was not expressly found, and the judgment of the Court was not grounded upon it. Here it is uncertain whether there will be any surplus after payment of the original debt, interest, and costs; and in order to confer a settlement by residence on a person's own estate, he must at the time have some certain interest in it either legal or equitable. In *R. v. Offchurch*, the cestui que trust had a right to reside on the estate. But a next of kin, however great his expectancies, cannot gain a settlement by residence on the property till he has fixed his right by taking out letters of administration (a); neither can a woman communicate a settlement to her second husband in right of her dower of the first, until it is assigned (b). The property here being a single cottage, there could be no surplus of land after the sale; which was not the case in *R. v. Hivelingham*. The object of the conveyance was for the sale of the whole, and not for any partial purpose. The case of *St. Michael's Bath* is therefore expressly in point. The continued residence of the parties here was permitted out of charity till an opportunity offered of selling the property. In *R. v. Catherington* (c), where a mortgagor who had been out of pos-

(a) See *b Sydenham v. Lamerton*, Set. & Rem. 103. 2 Conf. 624. *R. v. Wakeverthy*, Burr. S. C. 157. and *R. v. Loweswell*, Ib. 436. 2 P.

(b) *R. v. Painfulick*, Burr. S. C. 783.

(c) 3 Term Ref. 771.

session was afterwards permitted by the mortgagee to inhabit one of several houses mortgaged in order to overlook some repairs, the Court held such a residence not sufficient for the purpose of a settlement, saying that the party had neither *jus in re* nor *ad rem*.

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Lord KENYON C. J. Some points of this case are very clear. Generally speaking in the case of a purchase, if the value be under 30*l.* no settlement can be gained by virtue of it; that is, where it comes to the party by his own act: but if it come to him by operation of law the value is not material. That is the case here; for the purchase was made by the wife before the coverture, and it came to the husband upon his marriage by act of law; and he might even during the coverture have sold it without the assent of his wife. But the objection now made is, that this was not such an interest in the husband as was sufficient to enable him to gain a settlement by residence on the property, on account of the antecedent conveyance to *Price* the trustee. But what was that conveyance? It was for the purpose of securing the repayment of a sum of money expended by the parish for the use of the man's family. Lord *Mansfield*, in the case of *St. Michael's Bath*, said, it was an affront to common sense to say that a mortgagor has no interest in the mortgaged premises. The law recognises his interest: in the case of a freehold, he has a right to vote for members of parliament. Now the conveyance in question is equivalent to a mortgage, and no more. Consider what in strictness is the interest of a mortgagor; after the usual time given for the payment is expired, the estate becomes absolute in the mortgagee at law: but neither the courts of law or equity lose sight of what the parties intended. In mortgage

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deeds there is sometimes introduced a clause that the mortgagee may repay himself by sale of the mortgaged premises without the concurrence of the mortgagor; but a court of equity would, I believe, control the exercise of that power. I am sure they would control it in an instance like the present upon payment of what was due. The trustee in such a case would be bound to execute a reconveyance: and here there is an express clause to that purpose. Virtually therefore this is no more than a mortgage, and must be governed by the same rules. With respect to the case of *St. Michael's, Bath*, principally relied on, it is very plain that the greatest stress was laid on the circumstance of the pauper's possession having been obtained by fraud. After touching upon the interest which he had in the premises conveyed, Lord Mansfield says at the end of the case, "there is still another and a stronger ground in this case; for the possession was obtained by fraud." Now if the other point had been clear, he would not have used such an expression. Here the possession was not fraudulent; and therefore I am of opinion that the second husband, the pauper, gained a settlement by his residence on this estate, which came to him by operation of law on his marriage.

GROSE J. I cannot distinguish this from the case of a mortgage. The purpose of the conveyance was to secure the money. The parties interested continued afterwards in possession: the pauper paid the quit rents and repaired the premises. Now what more could a mortgagor in possession do? In the case of *St. Michael's, Bath*, another reason is given for the judgment than what is now relied on: the possession there was fraudulently obtained by the pauper: it was expressly found to be against the consent
 of

of the trustees who had before taken to the possession. Wherein the pauper always continued in quiet possession of the premises.

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against
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of
Barnston.

LAWRENCE J. The principal argument against the settlement set up in this case is grounded on a dictum in the case of *St. Michael's, Bath*, in the first part of the opinion delivered by Lord *Mansfield*: without which there is no pretence for the objection. For it cannot be disputed that a conveyance to a trustee in trust by sale, or mortgage, and receipt of the rents and profits to raise 10*l.*, is merely a security for that sum: and it is plain that the parties themselves so considered it, by providing for a re-assignment of all or so much as should not be sold, applied, or otherwise disposed of. Now in that case Lord *Mansfield* begins by saying that which is decisive as applied to this. "If the estate on which a pauper resides is *substantially* his property, that is sufficient, *whatever forms of conveyance* there may be:" and therefore, he says, that a mortgagor in possession gains a settlement, "because the mortgagee notwithstanding the form has but a chattel, and the mortgage is only a security." If then the object be merely to secure money, whether the conveyance be in the form of a trust like the present, or of a mortgage, it is in substance the same thing.

LE BLANC J. I am of opinion that the pauper gained a settlement by residing on this estate, in which he had an equitable interest; and I consider that the assignment to the trustee was no more than a security for so much money. According to what was said by Lord *Mansfield* in the case of *St. Michael's, Bath*, the Court will not look

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to the mere form of the conveyance, but will consider what the parties really meant by it. Then all this were substantially a mortgage, as I think it was, it is clear that the pauper gained a settlement by residing on the premises.

Order of Sessions affirmed.

Saturday,
Feb. 7th.

The KING against The Inhabitants of DORSTONE.

While the pauper resided in the parish of B. a freehold estate descended to his wife and her sisters as coparceners in the same parish, and in a month after the pauper and his wife contracted to sell their share, but the conveyance was not actually executed for more than forty days after their title accrued: held that the pauper was thereby settled in B., although the estate during all the time was in the occupation of another.

TWO justices by an order removed *Mansell Powell*, together with his wife and children, by name, from the parish of *Dorstone* to the parish of *Blakemere*, both in the county of *Hereford*. The sessions, on appeal, quashed the order, subject to the opinion of this Court on the following case: The pauper *M. Powell*, having gained a previous settlement at *Madley*, went, prior to *November 1778*, to reside with his wife and family in *Blakemere* upon a tenement which he rented there at 1 *l.* 15 *s.* per annum. On the 14th of the same *November*, and whilst the pauper resided at *Blakemere*, *T. Matthews* died intestate seised of a freehold house and lands in *Blakemere*, which descended to the pauper's wife and her two sisters as coparceners, being the grandchildren and co-heirs of the said *T. M.* On the 14th of *December* then next the pauper entered into the following agreement to sell his wife's share of the house and lands to *John Delahay*, husband of one of her sisters: "An agreement made between *John* and *Mary Delahay* of *Blakemere* in the county of *Hereford* of the one part, and *Mansell* and *Ann Powell* of the said parish of the second part, and *Wm.* and *Mary Crislesfor* of *Tiberton* in the said county of the

"third part, with the said parties have agreed
 "said family bound themselves in the sum of 20*l*. which
 "money is to be forfeited if either of the parties do not
 "stand to the valuation of the tenement and lands now
 "in the possession of Mr. *Wm* Read and *John Delahay*,
 "which land is to be valued by two or three men ac-
 "cording to their valuation upon oath if required. If it
 "is not all freehold, then it must be an abatement in the
 "said price, or if it should be more land, then it must be
 "valued according to the price. The purchase-money is
 "84*l*. the purchaser to pay the expence of the writing.
 "I bind myself to pay the money at *Candlemas* next if
 "there is a good title made." Signed by the pauper, his
 wife, and the other parties. After the agreement was
 signed the referees valued the pauper's wife's share of the
 premises at 28*l*. The deeds not being ready by the 2d of
February the pauper complained, and Mr. *Ellicott*, agent
 for *John Delahay*, offered to pay him three months' rent
 for his wife's share of the premises if required; but the
 pauper did not require it. The deeds were executed and
 the money paid the latter end of said *February* or be-
 ginning of *March* 1779. From the 14th of *November*
 1778, when the grandfather died, to the execution of the
 deeds in the latter end of *February* or *March* following,
 the pauper resided in the tenement he rented at *Blakemere*,
 but did not occupy any part of the tenement which de-
 scended to his wife and her sisters. The house and gar-
 den were in the occupation of the said *John Delahay* and
 his wife, one of the coparceners, and the rest of the land
 was occupied by one *Mead*, who had been tenant to the
 grandfather.

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Port was to have argued in support of the order of sessions, and *Williams* Serje. contra; but the former admitted, that after the recent decision of the Court in the case of *Houghton Le Spring* (a), he could not contend that the pauper might not gain a settlement by residing in the same parish in which he had an estate of freehold in right of his wife, although in the occupation of another. But he suggested a distinction between this case and that; that here the title accrued on the 14th of November, and within less than forty days, viz. on the 14th of December, the pauper bound himself to convey away the property.

The Court however said, that the contract was executory, and the conveyance was not actually executed till long after the forty days were expired, till when the title remained in the pauper, and consequently he gained a settlement in *Blakenere*.

Order of Sessions quashed.

(a) Ante, 247.

Saturday,
Feb. 7th.

The KING against BATTAMS and Others.

A certiorari to remove an indictment from the sessions may be sued out by the prosecutor, without giving the six days previous notice required by the stat. 13 Geo. 2. c. 12. s. 5. in the case of removing "convictions, judgments, orders, and other (summary) proceedings." The effect of such writ is to remove all proceedings of the nature described therein which have taken place between the teste and return, although the proceedings originated after the teste. The magistrates below are bound to obey the writ after production of it and notice to them in fact of such production when sitting in their judicial capacity: and after that all further proceedings before them on the matter are erroneous.

AN indictment was found at the quarter sessions of the peace for the county of *Buckingham*, holden at *Aylesbury* on the 15th January 1801, against the defendants for a riot and assault. And at the same sessions the attorney for the prosecutrix delivered to the clerk of the peace a

writ of certiorari (a) issued out of this court, and bearing teste the 28th of November last (b), for removing the said indictment into this court; which writ was afterwards handed up to the chairman, and was seen by him and other magistrates on the bench. No return however was made to the writ, nor any notice taken of it by the Court (c). On the first day of this term the prosecutrix took out the usual side-bar rule upon the justices to return the writ of certiorari, which they were directed to do within six days next after notice of the rule to be given to the justices, or one of them, and also to the clerk of the peace or his deputy. Whereupon a rule was obtained on a former day in this term on the part of the defendants, calling upon the prosecutrix to shew cause why this side-bar rule should not be discharged with costs to be paid by the prosecutrix to the clerk of the peace; upon an affidavit stating, that after the finding of the bill of indictment at the time abovementioned, a writ of certiorari, tested the 28th of November last, was found upon the table of the court, but by whom placed there was not known; but that the practice had always been to deliver such writs to the chairman, or one of the justices attending in court. That none of the justices of the peace

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(a) The writ runs in this form: "George the third, &c. To the keepers " of our peace, &c. we being willing for certain reasons that all and singular " indictments of whatsoever riots, assaults, and misdemeanors wherof B. and " two others are on the prosecution of A H indicted before you, as is said, " be determined before us, and not elsewhere, do command, &c. that you, " &c. send under your seals, &c. before us on, &c. all and singular the " said indictments," &c.

(b) The writ was in fact issued out on the 15th of January.

(c) It was stated at the bar, that the next day the trial was called on and the defendants acquitted for want of prosecution; but this did not appear in the affidavits.

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had received six days' previous notice in writing, nor any other notice of the issuing of the certiorari, as required by stat. 13 Geo. 2. c. 18. s. 5. The affidavits in answer swore positively to the delivery of the writ by the attorney for the prosecutrix to the clerk of the peace, by whom it was handed up to the magistrates.

Blackstone, in support of the rule (a), contended, 1st, that the writ of certiorari had issued irregularly, none of the magistrates to whom it is directed having had six days' notice of the issuing of it, pursuant to the stat. 13 Geo. 2. c. 18. By the prior stat. of the 5 & 6 W. & M. c. 11. and 8 & 9 W. 3. c. 33. certain restraints were laid on defendants suing out writs of certiorari to remove proceedings against them. This was followed up by the stat. 5 Geo. 2. c. 19. providing generally that no certiorari should issue for removing any judgment or order of the sessions on appeal, unless the party prosecuting such writ shall give a recognizance to prosecute it with effect, and to pay the costs in case the judgment or order should be affirmed. Then follows the act in question of the 13 Geo. 2. c. 18. which enacts, (s. 5.) "that no certiorari
" shall be granted to remove any conviction, judgment,
" order, or other proceedings had or made by or before any
" justice or justices of the peace, &c. or by the sessions, &c.
" unless such certiorari be applied for within six calendar
" months next after such conviction, &c. or other proceed-
" ings, and unless it be duly proved upon oath that the
" said party suing forth the same hath given *six days' notice*
" thereof in writing to the justice or justices, or to two
" of them, &c. by and before whom such conviction, &c.

(a) The order in which counsel were heard upon shewing cause is here reversed for the sake of a better arrangement of the objections and answers.

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"or other proceeding shall be so had or made; to the end that such justice or justices; or the parties therein concerned, may shew cause, if they think fit, against the issuing or granting such certiorari." The mischiefs which occasioned this act are stated in the preamble to be the vexatious delays and expence occasioned by the suing out writs of certiorari for the removal of such convictions, judgments, orders, and other proceedings before the magistrates below; these apply as well to the case of prosecutors as of defendants, and the words of the enacting part are comprehensive enough to include both. Then the rule of law applies, that remedial laws are so to be construed as to repress the mischief and advance the remedy. 3 Rep. 7. In the case of *The King v. The Justices of Glamorganshire* (a) it was holden, that the notice required by the statute must be strictly observed before any application for a certiorari for removing proceedings before justices; and no distinction was taken whether it were to remove an indictment or any summary proceeding, or whether it were applied for on behalf of the defendant or the prosecutor. There is a distinction in this respect between the case of the king and that of a private prosecutor; the Court are bound of right to award it at the instance of the king (b); but that is confined to cases where the crown is the real prosecutor: but in the latter case it only issues if no sufficient cause be shewn against it (c). 2dly, The writ bore teste before the indictment was preferred, and consequently could not operate to remove that which had no existence at the time. 3dly, But supposing the writ properly issued, it was not regularly delivered to the justices so as to bind

(a) 5 *Tam Rep.* 279.(b) 2 *Hawk. ch.* 27. s. 27.(c) *R. v. Lewis*, 4 *Burr.* 2456—8.

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them to obey it. It ought to be delivered and authenticated by the party, on whose behalf it is issued, to one of the justices to whom it is directed.

Lord Mansfield C. J. here observed, that if the certiorari were produced in court and came to their knowledge, it could not admit of an argument whether or not it should be obeyed. No doubt the Court were bound to yield obedience to it, and all subsequent proceedings upon the matter were void. Here it was sworn that the writ was handed up to the bench and seen by several of the magistrates, which is sufficient notice. And this Court would not lay down rules for regulating the manner in which the writ should be delivered to the justices below.

Garrow, Murray, and Best shewed cause against the rule: 1st, The act of the 13 Geo. 2. c. 18. does not relate to *indictments*, but merely to summary proceedings before magistrates: the words are, “convictions, judgments, orders, and other proceedings.” The latter must mean other summary proceedings like those before enumerated. They could not be intended of indictments and presentments; for, as to such, other express provisions are made in respect of removing them by certiorari by the statute 2 & 9 W. 3. c. 33. Neither can an indictment be so removed after judgment, which is one of the terms used in the act of the 13 Geo. 2.; but it can then only be removed by writ of error; therefore it can only relate to such summary proceedings as may be removed by certiorari after judgment. Also, by the constant practice of the Crown Office ever since the passing of the act, upon application for a certiorari to remove a “conviction, judgment, or order” of any justices of peace on behalf of a person against whom such proceedings were had, six days’ previous

previous notice has been given to the magistrates; but never in the instance of a certiorari to remove an indictment. Nor is it practicable in the latter case; for none of the justices have any knowledge of an indictment till it comes before them for trial, and then it would be too late to apply for a certiorari. And even in the cases of "convictions, judgments, and orders," it has not been considered necessary to give such notice under the statute where the certiorari was applied for at the instance of the prosecutor. For where the certiorari has even been taken away by the express words of an act of parliament, if the object of the act have appeared to be (as in this instance) to prevent vexation and unnecessary delay, the Court has decided that it only meant to deprive the defendants of the writ, and not to take it away from the prosecutors; as in *Rex v. Davies and others* (a), upon the construction of the stat. 25 Geo. 2. c. 36. s. 10., and *Rex v. The Inhabitants of the County of Cumberland* (b), on the construction of the stat. 1 Ann. c. 18. s. 5. Where indeed a defendant applies for a certiorari to remove an indictment, he must state some special ground by affidavit to induce the Court or a Judge to grant the writ (c). There is no foundation for the distinction contended for between the crown and a private prosecutor; as was determined in the case of *R. v. The Inhabitants of Bodenham* (d). At any rate the present rule

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(a) 5 Term Rep. 626.

(b) 6 Term Rep. 194.

(c) Vide *R. v. Lewis and Others*, 4 Burr. 2456.

(d) Cowp. 78. In another respect, however, a distinction prevails in the practice of the Crown-office between the case of the crown and that of a private person. Though a statute take away the certiorari from a defendant, or he cannot have it without laying special ground by affidavit before the Court, yet the crown, if the defendant be one of its officers, or if for any other reason it take up his defence, may have a certiorari in the name of the defendant,

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rule cannot be supported; for if the writ improperly issued it may be quashed; yet so long as it is in force it must be obeyed, and the grounds of issuing it cannot be disputed by the sessions. 2. As to the teste of the writ being prior to the finding of the indictment, it is the constant practice, and forms no objection to its operation. The effect of it is to remove all proceedings of the nature specified between the teste and the date of the return. Case of *Adrian Lampereve, and others*, 1 *Ventr.* 60. 1 *Roll. Abr.* 395. cites *Cheney's case*. 2 *Hawk. c.* 27. *f.* 78. *Cress v. Smith and others*, 1 *Salk.* 148. 2 *Ld. Raym.* 838. *Ibid.* 1305. *Regina v. White*, 1 *Salk.* 150. *Fitzwilliam's case*, *Cro. Eliz.* 915. *Yelv.* 32. and *R. v. Spelman*, 1 *Keb.* 93. After the delivery of the certiorari all the subsequent proceedings in the court below were erroneous. 2 *Hawk. c.* 27. *f.* 64.

LORD KENYON C. J. The words of the stat. 13 *Geo.* 2. *c.* 18. do not seem to me to affect the present case. It begins with enumerating proceedings of a lower denomination than indictments, such as "convictions, judgments, and orders" by justices of the peace; then the words "other proceedings" must mean proceedings before them ejusdem generis with those before mentioned,

defendant, without laying any special ground. Thus in the two cases alluded to by Lord Mansfield in 4 *Burr.* 2458., his lordship, when Attorney-General, obtained the writ; though a private individual would not have been entitled to it. Also in the case of *Rex v. James*, *M.* 26 *Geo.* 3., the Court granted the Attorney-General a certiorari to remove a record of conviction after six months, although the stat. 5 *Geo.* 2. *c.* 19. expressly directs that the certiorari shall be applied for within that time. And in *Rex v. Stannard*, 4 *Term Rep.* 161. the same thing was done at the instance of the Attorney-General applying for the defendant, although no special ground were laid before the Court by affidavit, as is required in other cases.

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namely, summary proceedings; and to such only it appears on perusal of the act that other provisions of it apply. His Lordship then referred to the case of *The King v. Farewell (a)*, (which he read from a MS. note of the late Mr. *Masferran* of the Crown Office.) A certiorari having issued at the instance of the prosecutor to remove an indictment for a nuisance in a highway from the quarter sessions, without an affidavit that the right of repair would come in question pursuant to the stat. 5 & 6 W. & M. c. 11. or any recognizance given according to that or former statutes; it was moved in *Hil. 17 Geo. 2.* that the certiorari should be quashed. The case was afterwards debated in *Easter 17 Geo. 2.* by some of the ablest men at the bar; and *Ld. C. J. Lee*, who was a judge of the greatest caution, enlarged the rule in order to look into the several acts of parliament; but observed at the time, “that he “had never known an instance where an affidavit in such “a case was ever made by or expected from a prosecutor, or “any recognizance ever entered into:” and that it would make great confusion in the Crown Office to overturn the proceedings in so many cases of that sort as had occurred. Mr. Justice *Chapple* also said, “that the legislature by those “acts of parliament never intended to lay prosecutors “under any hardships or difficulties.” And it appears that ultimately the certiorari was deemed to have been properly issued. It is true the decision there was not upon the particular statute in question, but it was made upon a general review of the subject; and the Court thought that the general words of the statutes restraining the issuing of writs of certiorari did not attach on prosecutors. The same construction has been put upon the statute in question

(a) Vide 2 *Str.* 1194. 1209.

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during a long course of practice, and it is now too firmly established to be broken in upon. These matters may not be so well known to the magistrates below, to whom I impute no blame; but we must take care to preserve a congruity in our proceedings. If the writ had improperly issued, there should have been an application to quash it; but it should not appear that there is a writ of the king's in force which is disobeyed.

Per Curiam,

Rule discharged with Costs.

Monday,
Feb. 9th.

The KING against JOHN SUDDIS.

By the mutiny act the king may make articles of war and constitute courts martial with power to try and punish, as well in Great Britain, &c. as in Gibraltar, &c. By a subsequent clause no soldier shall by such articles of war be subjected to the punishment of death

or loss of limb within Great Britain, &c. (omitting Gibraltar) for any crime not expressed to be punishable by the act. Then by the articles of war persons found guilty by a court-martial at Gibraltar of theft, robbery, &c. or of having used violence or committed any offence against the persons or property of others, "shall suffer death or such other punishment, according to the nature and degree of the offence, as by the sentence of such court-martial shall be awarded;" held that the court-martial have a discretionary power by such words, and are not restricted to pass such sentence on a delinquent as would be warranted by the law of England. But supposing they were, yet that a return to a habeas corpus, stating that upon a certain charge exhibited against the defendant before such a court, for certain offences alleged to have been committed by him at Gibraltar, such proceedings were had that the court-martial, after hearing the charge and the defence, found the defendant guilty of receiving certain goods named from the warehouse of W. (at G.) knowing them to be stolen, in breach of the articles of war, whereupon they sentenced him to transportation for 14 years, is good. For such a sentence would be warranted here by the stat. 4 Geo. 1. c. 11. if the principal were convicted of the felony, and the receiver were indicted as accessory after the fact. It seems a sufficient return to a habeas corpus that the defendant is in custody under the sentence of a court of competent jurisdiction to inquire of the offence, and to pass such a sentence; without setting forth the particular circumstances necessary to warrant such a sentence.

then

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then being stationed and in garrison at *Gibraltar* beyond the seas, and was in the actual pay of the king as a member of the garrison of *Gibraltar*; and was under the command of *Charles O'Hara* Esq. governor of *Gibraltar*. That on the 19th of *May* 1800 the said *John Suddis*, so being in actual pay as a member of the garrison of *Gibraltar*, was tried by a general court-martial duly holden at *Gibraltar*, appointed by the said *C. O'Hara* the said governor, and erected and constituted by and under the authority of his majesty, according to the form of the statute in that case made and provided, with power to try, hear, and determine any crimes or offences by and in pursuance of the articles of war made and established by his majesty for the better government of his majesty's forces, upon a certain charge exhibited against him before the same court-martial for certain offences alleged to have been committed by him at *Gibraltar* aforesaid; and such proceedings were thereupon had by and before the said court-martial, that afterwards, viz. on the day and year aforesaid, at *Gibraltar* aforesaid, the said court-martial did pronounce upon the said *John Suddis* the following sentence; (viz.), the Court having heard the evidence in support of the prosecution, together with what had been brought forward by the prisoner (the said *John Suddis*) in his defence, is of opinion that the prisoner *John Suddis* is guilty of receiving several pieces of printed cotton and two pieces of broad cloth stolen from the warehouse of *Mr. S. Watkins*, knowing them to be stolen, in breach of the articles of war; and doth therefore by virtue of the 4th article of the 24th section of the articles of war sentence him the said *John Suddis* to be transported as a convict to *Botany Bay* for the term of 14 years. That afterwards the aforesaid sentence was approved of and confirmed by the said governor of his

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his majesty's garrison of *Gibraltar*; and the said governor did, in order to carry the same sentence into effect, cause the said *John Suddis* to be sent to *England* in the custody of lieutenant *Rogers*, one of the lieutenants of the 70th regiment of his said majesty. And that afterwards, the said *John Suddis* having arrived in *England* and landed at *Portsmouth* aforesaid, in the custody aforesaid, and for the cause and purpose aforesaid, was by the said lieutenant *Rogers* delivered to him (*Sir W. A. Pitt*) as governor of his majesty's garrison at *Portsmouth*, to be by him safely kept until he should be sent to *Botany Bay* aforesaid, in pursuance and execution of the aforesaid sentence; and is now detained in his custody for the cause and purpose aforesaid, the said term of 14 years not being yet expired. And he further returned, that at the several times before mentioned the said *Samuel Watkins* was and is a subject of our said lord the king; and no form of civil judicature was in force at *Gibraltar* aforesaid having power to try an offender being a person in actual pay as a member of the said garrison of *Gibraltar*; and that the said warehouse in the sentence mentioned was and is situate at *Gibraltar* aforesaid: and this is the cause, &c.

Erskine on behalf of the prisoner admitted that the king had a military power to try offenders of this description at *Gibraltar*, in the absence of all civil judicature at that place: but objected to the insufficiency of the return, because it did not appear that the sentence of the court-martial was in conformity to the municipal law of *England* against such offenders, by which that court sitting in judgment for such offence was bound.

Abbott in support of the return. I. It is a general rule, that where a person has been committed under the judgment of another court of competent criminal jurisdiction, this court cannot review the sentence upon a return to a habeas corpus. This was so determined in *Brafs Croft's* case (a). In such cases this court is not a court of appeal. So in *Barne's* case (b); he was imprisoned by the Court of Admiralty until he should pay 40*l.*, or restore an anchor he had taken: and this being returned on a habeas corpus, a motion was made to discharge him on objections taken to the legality of the commitment: but *Montague C. J.* said, "it appears by the words *consideratum est* that there was a judgment given against him; and although the manner of their proceeding be not according to our law, yet we cannot redress it by the course now taken." "And also a return differs from other judicial proceedings, and such precise certainty is not required in returns; but it is sufficient if the court can learn from the return the substance of the matter." Therefore, 2dly, supposing the court-martial at *Gibraltar* were confined to inflict such a punishment only as the courts of criminal law here could have done, at least this court will support the sentence if possible by every reasonable intendment in its favour; and this may be done by supposing the principal to have been convicted, and *Suddis* tried as an accessory under the stat. 4 *Geo. 1. c. 11.* This will appear upon a review of the several statutes. The stat. 3 & 4 *W. & M. c. 9.* makes receivers of stolen goods accessories after the fact. The stat. 5 *Ann. c. 21. s. 5.*, which has the same provision, enacts, that such accessory shall suffer death as a felon. Then the stat. 4 *Geo. 1.*

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(a) 3 *Wilf.* 199.(b) 2 *Roll. Rep.* 157.

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2. 11. enacts, that they may be transported for 14 years. This must be understood where they have been tried for the felony; for *f. 6.* of the stat. 5 *Ann. c. 21.* provides that they may be tried for a misdemeanor if the principal be not convicted; or by stat. 22 *Geo. 3. c. 58. f. 1.* whether the principal be amenable to justice or not: and in either of such cases the accessory is punishable by fine, imprisonment, or other corporal punishment. But, 3^{dly}, The court-martial had a discretionary power to inflict what punishment they pleased, and were not bound to conform to our municipal laws. This is a transaction out of the realm, within a jurisdiction purely military. Our laws do not extend to *Gibraltar* proprio vigore. A discretionary power even to death is given to the courts-martial there: it is necessary to the preservation of military discipline. The mutiny act authorizes the king to delegate to them that power. By *f. 18.* the king may make articles of war, which shall be judicially noticed by all the judges. By *f. 19.* he may constitute courts-martial with power to try and punish, “as well within *Great Britain, Jersey*, “and the isles, &c. as in his majesty’s garrison of *Gibraltar*, and in any of his dominions beyond the seas.” By *f. 20.* “No officer or soldier shall by such articles of “war be subjected to any punishment extending to life or “limb within *Great Britain, Jersey*, or the isles, &c. for “any crime not expressed to be so punishable by the act.” This clause, which restricts the general power of punishment before given to courts-martial, omits *Gibraltar and the king’s dominions beyond sea.* *Secd. 5.* of the same act enables the king to grant his warrant to the governor of *Gibraltar* and of any other of his majesty’s dominions beyond seas, for convening general courts-martial (of which by *f. 11.* the governor cannot be one) for the trial of offences

offences committed by any of the forces under their command, who are to regulate their proceedings in the manner thereafter specified. By s. 9. provision is made for delivering up to the civil magistrate all offenders accused of any capital crime, "or of any violence or offence against the person, estate, or property of any of his majesty's subjects which is punishable by the known laws of the land;" but that does not extend to *Gibraltar*. The sentence in question is founded on the 4th article of the 24th section of the articles of war, which says, that "notwithstanding its being directed in the 11th sect. of these our rules and articles, that every commanding officer shall deliver up to the civil magistrate all persons under his command who shall be accused of any crimes which are punishable by the known laws of the land, yet in our garrison of *Gibraltar*, or in any other place beyond the seas, &c. where there is no form of our civil judicature in force, the governor, &c. is to appoint general courts-martial for the trial of persons under his command accused of murder, theft, robbery, &c. or of having used violence, or committed any offence against the persons or property of any of our subjects, &c.; and the persons so accused, if found guilty, shall suffer death or such other punishment, according to the nature and degree of their respective offences, as by the sentence of any such general court-martial shall be awarded." Now the above general words describing offences are the very same which are used in the first article of the 11th section of the articles of war, and also in the 9th section of the mutiny act, to denote every species of crime triable by the civil magistrate. And as to their inflicting punishment according to the nature and degree of the offence, a court-martial does not found its proceedings upon the common

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or upon the civil law: but they are sworn, according to the 12th sect. of the mutiny act, to administer justice according to the rules and articles of war, and according to the mutiny act. They must therefore judge according to the dictates of conscience and the necessity of the case. In military jurisdictions it may often happen in cases of emergency that a court-martial may be obliged to inflict death for an offence which at other times would require only a lenient punishment, and for which death could in no event be inflicted by the civil magistrate. The above mentioned provisions are therefore certainly ample enough to warrant the sentence which has been here pronounced.

Erskine contra. The court-martial which pronounced sentence on the prisoner is a court of inferior and limited jurisdiction; and if it appear upon the face of their proceedings that they have exceeded their authority, this court, though not a court of error for the purpose, have power on a return to a habeas corpus to interfere on behalf of the subject aggrieved. It might as well be contended, that if magistrates below, having power to inflict a penalty in a certain case, were to pass sentence of death on a delinquent and commit him for that purpose, this court could not liberate him. The words relied on, "shall suffer death or such other punishment according to the nature and degree of their respective offences as the court-martial shall award," do not give that court an unlimited discretion, but bind it to decide according to the rules of the law of England. In the late case of the mutineers of the *Bounty* (a), who were tried by a court-martial at *Perthmouth*;

(a) This ship was sent by his majesty a few years ago under the command of Capt. Bligh, for the purpose of transplanting the bread fruit and other valuable

mouth; there being no evidence against one of the persons accused, it was insisted on the part of another of them that he had a right to examine the first on his behalf: the Court however, by the advice of the Judge Advocate, refused to let him be examined; saying, that the practice of courts-martial had always been against it; and the prisoner was condemned to death: but upon the sentence being reported to the king, execution was respited till the opinion of the Judges was taken; who all reported against the legality of the sentence on the ground of the rejection of legal evidence; and the party was afterwards discharged. A similar case happened still more recently before a court-martial in *Ireland*, in the instance of Mr. *Stratford*, where the sentence was set aside on account of an irregularity in the trial against the rules of the common law. By what other rules or principles than those of the law of *England* can a court-martial measure the nature and degree of the offence? Then it is contended that this court, if necessary, will intend that the sentence was legal, and that they will presume that the principal was convicted. But the court can no more intend jurisdiction in an inferior tribunal upon a return to a *habeas corpus* than in any other mode of proceeding. It ought at least to have appeared that he was charged as accessory to a felony under the statute, and that he was convicted of such offence; but no specific charge is stated, and he is convicted generally of having knowingly received the stolen goods mentioned, *in breach of the Articles of war*: and no such offence being therein particularly specified, the jurisdiction can only be derived under the general words before mentioned, which relate

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humble plants from the Islands in the *South Sea* to the *British* colonies in the *West Indies*. A great part of the crew mutilated during the voyage and took possession of the vessel.

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to offences known to the law of *England*, by which therefore the trial and judgment must be regulated.

LORD KENYON C. J. I feel no difficulty in delivering the opinion which I entertain; because the prisoner will not be concluded by it, but may if he be dissatisfied apply to the other courts of *Westminster-hall*. The natural leaning of our minds is in favour of prisoners; and in the mild manner in which the laws of this country are executed, it has rather been a subject of complaint by some that the Judges have given way too easily to mere formal objections on behalf of prisoners, and have been too ready on slight grounds to make favourable representations of their cases. Lord *Hale* himself, one of the greatest and best men who ever sat in judgment, considered this extreme facility as a great blemish, owing to which more offenders escaped than by the manifestation of their innocence. We must however take care not to carry this disposition too far, lest we loosen the bands of society, which is kept together by the hope of reward and the fear of punishment. It has been always considered, that the Judges in our foreign possessions abroad were not bound by the rules of proceeding in our courts here. Their laws are often altogether distinct from our own. Such is the case in *India* and other places. On appeals to the Privy Council from our colonies, no formal objections are attended to if the substance of the matter or the corpus delicti sufficiently appear to enable them to get at the truth and justice of the case. The prisoner in this instance has been tried before a court of competent jurisdiction at *Gibraltar*, by which he has been convicted of receiving certain goods knowing them to have been stolen, and has been sentenced to transportation for fourteen years. It is not denied but that for the
same

same corpus delicti (not indeed in the same form) the same judgment might have been given in the courts here, if the principal had been convicted; which however does not in truth at all affect the guilt of this man. But it is said, that this not appearing, we must take the sentence to be illegal. Whether the principal were or were not convicted does not appear upon this return; it only says, taliter processum est, &c., why therefore are we to conclude that the sentence is illegal? We are not now sitting as a court of error to review the regularity of their proceedings, nor are we to hunt after possible objections. I have said this, admitting pro hac vice that we may examine into this question on a return to a habeas corpus; but that is an arduous question, on which if it were necessary I should wish to take much more consideration. At present I see no reason for saying that the cause returned is not sufficient.

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GROSE J. It was properly admitted, that the court-martial had authority to try the offender and inflict punishment according to the nature and degree of the offence as regulated by the law of the land. Then taking that to be so, the answer to the objection made to this return is, that according to the law of this land the court-martial might under certain circumstances have inflicted the punishment which they have awarded for this offence, that is, if the principal had been convicted of the felony, and this party had been tried as the accessory under the statute. But it is said, that this does not so appear upon the face of the return. That however is an objection in error, and we do not sit now as a court of error. It is enough that we find such a sentence pronounced by a court of competent jurisdiction to inquire into the offence, and with power to

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inflict such a punishment. As to the rest we must therefore presume omnia rite acta.

LAWRENCE J. Two objections have been made to the return; first, that the court-martial have exceeded their jurisdiction in inflicting a punishment beyond what they were authorized to do. That turns upon the construction of the 4th article of the 24th section of the articles of war, by which persons found guilty of any of the offences therein described “shall suffer death or such other punishment, “according to the nature and degree of the offence, as by the “sentence of the court-martial shall be awarded.” And these words, it is said, must be understood *according to the laws of England* under similar circumstances. I do not however think that is the proper meaning; but that it was intended to give the court-martial a discretionary power to apportion the punishment according to the degree of guilt of the party convicted. If it had been meant that their judgment should be governed by the law of *England*, it would have been more obvious to have so expressed it than to have used such general and indefinite terms. Secondly, assuming that the court-martial was bound to give judgment according to the laws of *England*, it is objected that the sentence is illegal, because it does not appear upon the face of the return that the principal was convicted; but I cannot admit the validity of that objection on this proceeding. This is a return to a writ of habeas corpus made by the person in whose custody the party is placed in execution of his sentence. He cannot be taken to be cognizant of all the proceedings. It is enough that the court had authority to award such a sentence. He returns the cause for which he detains the party in custody, namely, the judgment of such a court. This return I believe is as much

much as it has been ever usual to make in such cases. However I am of opinion upon the first objection, that the court-martial were not bound to pass such a sentence as the law of *England* would warrant upon a similar charge.

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LE BLANC J. The principal question is, Whether a party who is in custody under the sentence of a court of competent jurisdiction, and is brought up here upon a writ of habeas corpus, be entitled to his discharge on the ground, that it does not appear upon the face of the return that certain facts existed which are contended to be necessary to warrant such a sentence. It is not denied that the court-martial had power to try the offender: but it is contended, that the words alluded to in the articles of war, "according to the nature and degree of the offence," &c. restrained the court to pass such a sentence as was conformable to the law of *England* in the like case. But I cannot accede to that construction. It seems to me to have been intended to give the court-martial a discretionary power of inflicting punishment on the offender, having regard to the enormity of the offence. This gets rid of the objection as to the principal not appearing to have been convicted. But another objection is, that it does not appear that the party was charged with the offence of which he was convicted. To which the answer is, that it is sufficient for the officer having him in his custody to return to the writ of habeas corpus, that a court having a competent jurisdiction had inflicted such a sentence as they had authority to do, and that he holds him in custody under that sentence.

The Prisoner was remanded.

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EYRE and Another against DUNSFORD.

The defendant having had a credit lodged with him by a foreign house in favour of one *W. T.* to a certain amount, upon an express stipulation that *W. T.* should previously lodge in his hands goods to treble the amount; and being applied to by the plaintiffs for information respecting the responsibility of *W. T.* answered that he knew nothing of *W. T.* himself, but what he had learned from his correspondent; but that *he had a credit lodged with him for so much by a respectable house at H., which he held at W. T.'s disposal*; (omitting the condition,) and that upon a view of all the circumstances which had come to the defendant's knowledge, the plaintiffs might execute *W. T.'s order with safety*; (viz. an order for the sale and delivery of goods on credit). In an action on the case to recover damages incurred by the plaintiffs in consequence of having trusted *W. T.* on this representation; held that there was a material suppression of the truth, and evidence sufficient for the jury to find fraud, which is the gist of the action; although the defendant had no immediate interest in making the false representation; and though at the time when it was made, he added, *that he gave the advice without prejudice to himself.*

THE declaration stated, that before the committing of the grievance after mentioned, to wit, on the 24th of May 1799, at London, &c. one *William Thompson* then of Hamburg applied to the plaintiffs (traders,) and requested them to export, sell, and deliver to him goods of great value upon credit; and thereupon the plaintiffs being unacquainted with the credit, circumstances, and character of *Thompson*, and whether they might safely sell and deliver to him goods upon credit, applied to the defendant (being a partner in trade with one *Lichigaray*) to be by him truly informed of the credit, circumstances, and character of *Thompson*; of all which said premises, &c. the defendant had notice from plaintiffs, and was requested by them to inform them truly of the credit, circumstances, and character of *Thompson*; and thereupon the defendant fraudulently, deceitfully, and wrongfully contriving and intending to deceive, injure, and prejudice the plaintiffs, and to induce and cause them to export, sell, and deliver the said goods to *Thompson* upon credit, afterwards, &c. did falsely, deceitfully, and wrongfully affirm and represent to the plaintiffs, that they, the defendant and his partner, were informed by a very respectable house at Hamburg that *Thompson* was of respectable connexions, and a person to whose character they (the said defendant and his partner) might speak with confidence; and that the defendant and his partner had a credit

lodged

judged with them by the same house for 12,000 l., which they held at Thompson's disposal. And on the defendant's being informed by the plaintiffs that the amount of the goods which Thompson had so applied to the plaintiffs to export, &c. to him, would be about 1000 l., the defendant further intending as aforesaid did falsely, &c. affirm and represent to the plaintiffs, that they (the defendant and his partner) thought the order might be executed with safety. That the plaintiffs confiding in the said assertions and representations of the defendant, and believing the same to be true, and not knowing the contrary thereof, afterwards, to wit, on the 15th of August in the year aforesaid, &c. were thereby induced to and did export, sell, and deliver to Thompson the goods to the amount of 710 l. 12 s. 9 d. upon credit for six months: whereas in truth, at the time the defendant so made the said affirmations and representations, he and his partner were not nor had been informed by a very respectable house at Hamburg that Thompson was of respectable connexions, and a person to whose character the defendant and his partner might speak with confidence, and the defendant well knew the same; and in truth, the defendant and his partner at the time, &c. had not a credit lodged with them by the said house at Hamburg, &c. for 12,000 l. &c. and the defendant well knew the same; and in truth, at the time, &c. they, the defendant and his partner, did not think the said order of the said Thompson might be executed by the plaintiffs with safety. And the plaintiffs further say, that although the said six months for which they did so trust and give credit to Thompson for the goods are elapsed, yet Thompson hath not yet paid the plaintiffs, &c. for the said goods, &c., and ever since hath been and still is unable to pay, &c. By means whereof, &c. There

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were other counts to the same effect, varying the words spoken. To this the general issue was pleaded.

At the trial before *Le Blanc J.* at the sittings after last term at *Guildhall*, it appeared in evidence that the plaintiffs were woollen manufacturers living at *Leeds*; and the defendant a merchant in *London* in partnership with *Lichigary*. Previous to the transaction in question the defendant's house had received a letter from *Claude Coulett, and Co.*, a respectable house at *Hamburg*, which explains the nature of their connexion with and knowledge of *Thompson*, the person named in the declaration; of whom or his situation and circumstances the defendant had no personal knowledge or other notice than the letter itself imports. This letter was dated *Hamburg, 1st March 1799*, and was produced in evidence as containing the account of the original credit lodged with the defendant for *Thompson*.

“ We are to-day enabled to speak to you of the business
 “ relating to the consignment of goods of *English* manufac-
 “ ture which has already been agitated between us. It is
 “ agreed, that the people who forward these articles shall
 “ consent to receive only one third of the value by antici-
 “ pation, instead of the half, as had been first proposed;
 “ which gives a greater degree of solidity to our arrange-
 “ ment. We authorize you in consequence to furnish for
 “ our account to *Mr. William Thompson* of this city, or to
 “ his order, your acceptance to the extent of ten to twelve
 “ thousand pounds sterling, for which acceptance there will
 “ be previously delivered to you goods of *English* manufacture
 “ in wool or cotton do. to the extent of thirty to thirty-six
 “ thousand pounds sterling, which will be submitted to your
 “ verification and valuation, so that there may be nothing
 “ over-

“ over-rated either in the prices or in the quality. You
 “ have annexed the signature of Mr. *William Thompson*, in
 “ order that you may know it to a certainty. We have
 “ delivered to him a letter making mention of the above
 “ credit, and which he will forward to you with what he
 “ may have to add at the foot of his signature. Hitherto
 “ we know only him in this business, our relations with
 “ him and his existence, which known to us have enabled
 “ us to appreciate the confidence which he deserves, and
 “ with which he has inspired us. He is a merchant of
 “ this city. It is very probable that the delivery of the
 “ goods will not take place at once, but that they will be
 “ gradual ; which will put an interval to your acceptances,
 “ and will give you a greater facility in the payment.
 “ Not wishing to neglect any means that may free our
 “ affairs from all kinds of obstacle, you will take every
 “ precaution that the goods in your hands may be secured
 “ against any attack or ulterior pursuits ; since not know-
 “ ing the laws of your country we cannot too strongly
 “ recommend to you to put our property under shelter
 “ from every unpleasant event. Prudence dictates to us
 “ these reflections, the justice of which you will undoubt-
 “ edly see. We have prevailed upon the friend who has
 “ procured us this business to leave to your care to cover
 “ the insurance of the whole amount of the goods that
 “ may be delivered to you, for which however you will
 “ only be under acceptance of the third : but on consenting
 “ thereto he has made it a condition that one half of the
 “ usual commission should be allowed to him, since he
 “ makes a sacrifice of the advantage to be derived on
 “ effecting the insurance here, in order to increase your
 “ security. We found this proposal so reasonable, that we
 “ have not hesitated to assure him of your concurrence.

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“ It

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“ It is then agreed in consequence of the first opening
 “ which we made use of in this business, that you shall be
 “ allowed one percent. commission on the amount of your
 “ acceptances; for which you will receive the goods, have
 “ them examined and valued, and shipment made to us by
 “ vessels positively under convoy, unless an express alter-
 “ ation should be made by us. We will hand you remit-
 “ tances in time to cover your acceptances: if however
 “ contrary to our expectations these remittances should
 “ be retarded, you will value on us with the needful ad-
 “ vice. We do not presume that it is probable any delay
 “ will be occasioned by the winds; for it would be extra-
 “ ordinary if a triple value of goods did not furnish in the
 “ first sales sufficient to face these first engagements. As
 “ to the rest, rely upon our care and punctuality, &c. If
 “ the persons who consign these articles find they turn to
 “ account, they will doubtless continue them, and furnish
 “ fresh parcels of goods in proportion to the sums of
 “ which you shall be covered; so that without exceeding
 “ the prescribed limits of your acceptances, certain activi-
 “ ty will always be kept up and increase the advantages
 “ which we may each expect from this operation. It is
 “ understood that the drafts which shall be insured upon
 “ us shall be at three months. We doubt not but the
 “ houses from whom you are to receive goods to such an
 “ extent are people of respectability. We leave to your
 “ judgment to conceive if the credit which Mr. *Thompson*
 “ will transmit to them in virtue of the one which we
 “ give him on you will equal a recommendation; we shall
 “ see it with the more pleasure, as these houses are spoken
 “ of to us in the highest terms. Although we have not
 “ the pleasure of being acquainted with them, we shall be
 “ obliged to you for what you may do on this business.

“ Post-

“ Postscript. The letter of recommendation and credit
 “ which we have given to Mr. *Thompson* will be remitted
 “ to you by Messrs. *Meyer, Wernor, and Company*, whose
 “ signature is in the same paper as that of Mr. *Thompson*.
 “ Be so obliging to take note therefrom.” It also appeared, that previous to the transaction in question application was made to the plaintiffs to furnish goods to *Thompson* at *Hamburg*; which application was conveyed to them in a letter from a Mr. *Cole* of *Hamburg*, dated 24th of *May* 1799, in which *Thompson* was recommended to them as a valuable correspondent, and a promising character given of him: and at the same time the plaintiffs also received a letter from *Thompson* himself, expressing his wish to purchase goods of them, and referring them to the house of *Lichigaray* and nephew (the defendant’s house) for his character. In consequence of this the plaintiffs sent up these letters from *Leeds* to their agent in *London*, with directions to apply to the defendant’s house to whom they had been referred for *Thompson*’s character. Accordingly on the 8th of *June* 1799, the plaintiffs’ agent went to the defendant’s house, and there communicated to him that he waited on him from the plaintiffs to inquire the character of *William Thompson* of *Hamburg*, and shewed him the letters which the plaintiffs had before received. The defendant answered, *we do not know Mr. Thompson ourselves, but he is recommended to us by a very respectable house at Hamburg as a man of respectable connexions.* Being asked if they knew any thing of *Thompson*’s property, the defendant answered, *that they knew nothing of him themselves; that what they knew of him they had obtained from a house at Hamburg.* The agent then asked defendant if he knew *Cole*, of whom the plaintiffs had a very short acquaintance, and had had no dealings with him; he answered, not much,

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but he had been introduced by respectable persons. Being then questioned again about *Thompson*, the defendant answered, "*we have a credit lodged with us by a very respectable house at Hamburg for 12,000*l.* which we hold at his*" (*Thompson's*) *disposal.*" The defendant then asked the plaintiffs' agent what was the amount of *Thompson's* order on them for goods? and being answered, about 1000*l.*, made no immediate reply. The agent then asked him "if every thing was regular with *Thompson*, and whether from a view of all the circumstances that had come to their knowledge the plaintiffs might execute the order with safety." The defendant answered, "yes; every thing is regular, and I think you may execute the order with safety; but we give this advice without our prejudice." The plaintiffs, relying on this representation, executed the order, by furnishing goods to *Thompson* to the value of 712*l.* 9*s.*, at six months credit. *Thompson* soon after failed. The agent also swore positively, that the defendant never mentioned the condition on which the house at Hamburg had given *Thompson* credit, (as stated in their letter to the defendant's house before mentioned; namely, on a previous deposit of goods to the amount before mentioned,) but the representation was made to him without the qualification of any condition whatever. On the other hand, a witness produced by the defendant swore, that the defendant had expressly mentioned to the plaintiffs' agent, that the credit was lodged with them by the house at Hamburg to the amount stated, on condition of goods to a superior amount being to be delivered to them. The case went to the jury principally on the credit which they would give to one or other of the witnesses; the learned Judge conceiving that if they believed the plaintiffs' account of the conversation, and that so material a circumstance as the condition on which the credit had

had been given was suppressed by him in the representation which he made to the plaintiffs of *Thompson's* responsibility, they would be entitled to a verdict for damages, notwithstanding the advice was said to be given *without their prejudice*. The jury believed the plaintiffs' witness, and found a verdict with damages to the amount of the loss sustained.

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A rule was obtained to shew cause why there should not be a new trial, on the ground that the foundation of such an action is actual fraud and deceit, and not merely forgetfulness, inadvertence, mistake, or neglect. That it was a material averment in the declaration, *that the defendant*, at the time when the representation was made of *Thompson's* credit, "*did not think that the order of Thompson*" "on the plaintiffs might be executed by them with safety," of which there was no proof; on the contrary, there was reason for him to think well of *Thompson* from the general tenor of the letter which the defendant and his partner had received from their correspondent at *Hamburg*, and which appeared and was stated to be the foundation of their knowledge of *Thompson*. That the utmost amount of the evidence was, that the defendant had inadvertently omitted to state the ground on which the credit for *Thompson* had been lodged with his house, namely, the security of goods to a greater amount; but this in itself was no evidence of fraud, to commit which the defendant had no motive of interest; for the commission which it appears that he was to receive was merely upon the acceptances made by his house in ~~favor~~ of *Thompson*. That in *Pasley v. Freeman* (a) it was settled, that in order to sustain the action not only the affirmation by which the plaintiff sustained

(a) 3 Term Rep. 51. all the authorities upon the subject are there collected.

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damage must be false, but it must be made with intent to defraud, being in the nature of an action of deceit. And that in all the actions which had been tried since that, there had been actual fraud proved, an intention to procure an unwarrantable advantage either to the adviser himself, or to some other for whom he was interested, to the prejudice of the plaintiff. That here the question of fraud had not been left distinctly to the jury; so that they might have found their verdict upon the supposition that inadvertence alone was a sufficient ground for the action, provided the representation were untrue, and the plaintiffs had been thereby induced to give the credit, which had turned out to their detriment.

LE BLANC J. stated, that the struggle at the trial was, whether the witnesses for the plaintiffs or for the defendant were to be credited, as to the suppression or disclosure of the material circumstance in the communication made by the defendant to the plaintiffs: the consequence resulting in either case seemed to be taken for granted; and the question of fraud was therefore probably not so fully and pointedly put to the jury as it would otherwise have been.

Garrow and *Gibbs* shewed cause against the rule. The defendant, if he made any representation at all, was bound to make a fair and impartial one. The omission made by him was too important to have happened from mere inadvertence; and that was not the ground of his defence at the trial, but a denial of the fact. In truth, the defendant had an interest at stake in holding up the general credit of *Thompson*, although he was not to gain any thing by the particular transaction; for if *Thompson* continued in credit
 and

and ability, the defendant would in the course of his dealings with him get a commission on the money passing through his hands, which might have been to the amount of 36,000 *l.*, the value of the goods to be deposited. And no doubt the jury decided on that ground.

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Erskine and *Park* then argued in support of the rule, insisting upon the grounds before stated. In addition to which they observed, that the defendant was not fairly put on his guard by the representation of any doubt entertained by the plaintiffs respecting *Thompson's* character; which might have recalled all the circumstances of the relation between them to his recollection. On the contrary, the letter which the plaintiffs themselves had received from *Cole* at *Hamburg*, which was communicated to the defendant, was rather calculated to increase his good opinion of *Thompson*. That fraud ought not to be implied in such a case, but there should be express and positive evidence of it. That without such a broad line of distinction the nature of the action was calculated to intrench on the statute of frauds, by making one man collaterally answerable in effect for the debt of another, without any promise in writing; which would lead to dangerous consequences. That though if there had been positive evidence of fraud the defendant could not have screened himself from the consequences by adding that what he said was without prejudice to himself, yet at any rate it should have put the plaintiffs on their guard to have required further explanation, and was sufficient to rebut the implication of fraud.

Lord KENYON C. J. Taking for granted that the case of *Pasley v. Freeman* was well decided, and that it gives the true ground of law by which cases of this sort must be

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governed, which is not now disputed, it makes an end of the present question. A new objection however is started, which if well founded would have applied equally to that case, namely, that this is an undertaking to answer for the debt of another, and not being in writing is void by the statute of frauds. That statute however has no relation to these cases. It raises certain legal presumptions of fraud from the want of certain formalities in contracts and other transactions, against which it guards by avoiding them : but that has no application to actions founded on actual fraud and deceit, in order to recover damages by the party grieved. In the present case, one man applies to another to know the character of a third person who offers to contract with him : that other need not have answered the inquiry at all, but if he do, he is bound in justice and common honesty to give a fair representation of what he knows. On the contrary, the defendant when applied to says, we know nothing of him ourselves; but “ *we have a credit lodged with us by a very respectable house at Hamburg for 12,000l. which we hold at his disposal.*” Now that representation was grossly false ; for the instruction to the defendant was really no more than this, that *as soon as Thompson had lodged goods to the amount of 36,000l. in the defendant's hands, he was to give him credit for 12,000l.* This in truth was totally different from the representation which the defendant made, and was calculated to give quite a different colour to the transaction. This was so plain that it could not even be stated to a jury on the part of the defendant at the trial, that a merchant in business could have made such an omission in the representation made by him from mere negligence ; but the fact itself was denied, and the jury believed the plaintiffs' witness. It is no answer to say that the defendant had no interest in making

the false representation: it is immaterial to the cause of action whether he had or not (a).

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GROSE J. It has been already decided in *Pasley v. Freeman*, that an action will lie for making a false representation of a person's character in order to deceive another who inquires for information concerning it. The action, it was there holden, is founded on fraud, and on no other ground can it be maintained. If then the question of fraud were submitted to the jury, there can be no doubt but that it was competent to them on this evidence to have found that fact against the defendant. And from the course which the trial took, that seems to have been the case.

LAWRENCE J. There is abundant evidence to shew that the defendant so conducted himself upon this occasion as to enable the plaintiffs to maintain their action. The case proved was not that something inadvertently slipped from the defendant in conversation, without attention to what he was saying; but the fact was, that *Thompson* having a credit upon the defendant to a certain amount, in consequence alone of his having deposited goods to a much greater value, was represented by the defendant as a person generally entitled to credit; which it is plain was not warranted by the true nature of the transaction when fairly explained. The law as laid down in *Pasley v. Freeman* was adverted to, and not controverted at the trial; but the only defence then attempted was, that the fact itself of the information being suppressed was not true; impliedly admitting that if it were true,

(a) Vide *Pasley v. Freeman*, S. P.

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the evidence was sufficient to warrant a verdict for the plaintiffs. After this it is rather unprecedented to move for a new trial on a ground which made no part of the defence before the jury, but was in effect conceded at the time.

Rule discharged.

Wednesday,
Feb. 11th.

D^RARGENT against VIVANT otherwise TAYLOR.

The affidavit to hold to bail is part of the process to bring the defendant into court; any irregularity in it must be taken advantage of in the first instance, and is waived by the defendant's putting in bail. Such affidavit ought to give the addition as well as place of abode of the party making it.

UPON a rule to shew cause why the bail-bond given to the sheriff should not be delivered up to be cancelled, and an exoneretur entered on the bail-piece, on the defendant's filing common bail; which rule was obtained on the ground of a defect in the affidavit made to hold the defendant to bail, the same having been made by the plaintiff without giving herself any addition, but only describing herself by the place of her abode: The facts were, that the defendant having been arrested by process returnable the first return of the term grounded upon this affidavit, put in bail on the 27th of January, and made this application on the next day but one, the 29th.

After *Jervis* had been heard in support of the rule, who relied on *Jarret v. Dillon* (a); and *Barrow* against the rule, who cited *Jones v. Price* (b);

The Court took time to consider of the cases with a view to settle the practice in future; and now Lord Kenyon C. J. delivered their opinion. After stating the

(a) Ante, 18.

(b) Ante, 81.

rule and the facts above mentioned; he proceeded as follows;

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That the affidavit is defective for want of such addition cannot be disputed: The Rule of Court of *Mich.* 15 *Car.* 2. expressly requires “that the true place of abode and true addition of every person who shall make affidavit in court here shall be inserted in such affidavit.” Several instances have lately occurred where defendants have been discharged on filing common bail, because the affidavit to hold to bail was defective in not stating the addition of the party making such affidavit as required by this rule of Court. And in the case of *Jarret v. Dillon*, in this court in the last term, *Engl's Rep.* 18., the Court, on argument by counsel, made a rule absolute for entering a common appearance for the defendant on a like defect in the affidavit to hold to bail. But it has been contended in the present case, that admitting the affidavit to hold to bail to be defective, yet the Court ought not now to interpose, the application having been made too late, being the day after the defendant had put in bail: that this objection is to be considered in the nature of an objection to process, which the defendant may make before putting in bail or entering an appearance; but that by putting in bail a defendant waves every objection to the process. In the case which has been already alluded to of *Jarret v. Dillon* in the last term, one objection made by the plaintiff against the rule was, that it was not competent to the defendant to take any objection to any proceeding in this cause till he had appeared in court by putting in good bail: but the Court, notwithstanding that objection, made the rule absolute; thereby clearly deciding that this was to be considered as an objection to process which may be

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taken by a defendant before he has appeared or put in bail. In *Norton v. Danvers*, Mich. 38 Geo. 3. in this court, 7 Term Rep. 375., the defendant being informed that a writ had been taken out against him on the 27th June, he gave a bail-bond; and in *Michaelmas* term following he obtained a rule to shew cause why the bail-bond should not be delivered up to be cancelled, on the ground of the affidavit to hold to bail being defective in not stating that no offer had been made to pay the debt in bank-notes. On shewing cause against the rule the plaintiff relied on the defendant having waved all objections to the bail-bond; first, because he had not objected in last *Trinity* term; and secondly, because he had voluntarily given the bail bond. In answer it was said, that the defendant had not waved his right to take advantage of the objection, either on account of the time which had elapsed since the bail-bond was given, it having been given only a few days before the end of the last term; or on account of his having voluntarily given the bail-bond; that having been given merely to prevent the arrest. And, secondly, that this was a defect in the proceedings themselves which the defendant could not wave, and not simply an irregularity in the mode or time of proceeding. But the Court said, that the affidavit to hold to bail was only process to bring the party in, and if he chose to wave any objection to that, he may do it: and that in this case he had waved taking advantage of the objection. If indeed the defendant had been actually under arrest at the time, his consent to give a bail-bond would not have been binding on him, because it might be considered as given under duress; but here he voluntarily gave the bail-bond. In *Chapman v. Snow*, in C. B. Mich. 38 Geo. 3. *Bosanquet and Puller's* Rep.

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Rep. 132. defendant was arrested on 5th *August*; he had put in and perfected bail above, and a plea had been demanded; and on the 18th of *November* a rule was obtained to shew cause why an exoneretur should not be entered on the bail-piece, and a common appearance allowed, on an omission in the affidavit to hold to bail in not denying a tender in bank-notes. On shewing cause it was alleged that the defendant had waved any irregularity in the affidavit; 1st, by putting in bail above; 2^{dly}, by delaying to apply to the Court till the 18th of *November*, twelve days after the commencement of the term. It was answered on the part of the defendant that it was impossible for him to make this application till he was regularly in court, which he was not till he had put in and perfected bail. Mr. Justice *Heath* and Mr. Justice *Rooke*, who were the only judges in court when cause was shewed against the rule, held that the defendant had waved the irregularity, and discharged the rule. On the next day Lord C. J. *Eyre* said, " My brothers have mentioned to me a
 " rule for entering an exoneretur on the bail-piece, and
 " allowing a common appearance, which was yesterday
 " discharged, and I think properly discharged. The de-
 " fendant is not now in custody, he has put in bail, and
 " is therefore too late to make this application. If he
 " were to be allowed to move now, I do not see why
 " he might not be at liberty to move after proceedings
 " commenced against the bail. Perhaps the plaintiff has
 " proceeded against them, and is very near judgment; for
 " any thing I know he may have got judgment: Where then
 " is the Court to stop? Here the process is bad: the
 " party does not come in the first instance, but does a
 " voluntary act by perfecting special bail: the cause goes
 " on, with a total disregard to what is passed; the bail to
 " the

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—
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“ the sheriff are discharged, and the whole of that proceeding is gone : Shall the defendant now be allowed
 “ to apply to us to discharge the special bail, and introduce common bail in their place ? I think he should not
 “ be heard.” In *Jones v. Price*, Michalmas term 41 Geo. 3. in this court, *East's Rep.* 81., the defendant had voluntarily put in special bail at the return of the writ, justified the bail although not excepted to, and drawn up the rule for the allowance and served it on the plaintiff : within a week after which he obtained a rule to shew cause why an exoneretur should not be entered on the bail-piece, on an objection to the affidavit to hold to bail, that it did not negative a tender of the debt in bank-notes. It was answered on the part of the plaintiff that the defendant had waved any informality in the process by the above steps which he had taken. To which it was replied for the defendant that this was an application on the part of the bail, who were obliged to justify before they could be heard ; and they had taken the objection in reasonable time afterwards. But the Court said that this was a clear waver of the objection : that application should have been made in the first instance before the bail had justified : instead of which the defendant had lain by, and suffered the plaintiff to incur additional expence on a supposition that all the proceedings were right, and then came to complain. But he had adopted the process, and should not then take advantage of any defect in it. These several authorities shew that in this court, as well as in the Court of Common Pleas, the affidavit to hold to bail is to be considered as part of the process to bring the defendant into court ; that an irregularity in it must be taken advantage of in the first instance, and may be done before bail put in or appearance entered : That such irregularity may be
 waved

waved by a defendant; and is considered as having been waved when a defendant has voluntarily done an act submitting to such process, instead of taking steps to avail himself of such irregularity, which ought always to be done in the first instance. Here the defendant put in bail on the 27th *January*, four days after the commencement of the term, during which time he might and ought to have taken the objection to the regularity of the affidavit under which he had been holden to bail. We are therefore of opinion that he has waved this objection. The consequence is that this rule must be discharged.

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MAANSS *against* HENDERSON and Others.

Wednesday,
Feb. 11th.

IN assumpsit, the case was, that the plaintiff, being a *Prussian* residing at *Stetin* in *Prussia*, and owner of the ship *Gustav*, consigned the said ship in 1796 to *Jennings* of *Liverpool*, with orders to charter her with salt on the plaintiff's account from *Liverpool* to *Riga*, and to effect an insurance thereon. *Jennings* opened the policy in the usual way in his own name with the defendants, who were brokers residing in *Liverpool*, with whom he had before been in the habit of effecting insurances on account of others as well as for himself. Nothing was said by *Jennings* on this occasion whether the policy were opened on his own or any other account, except that he said it *was neutral*; and the policy itself, though effected in the name of *Jennings*, was warranted *neutral*. This was done on the 14th of *October* 1796, and it was not till the 31st, after *Jennings* stopped payment, that he told the defendants that he was only an agent in this transaction, and named to them his principal, the present plaintiff. The ship sailed

Where an English Subject in time of war, who had received orders to effect an insurance for a neutral foreigner, opened the policy with his usual broker in his own name, but informing him at the same time that the property was *neutral*; this is a sufficient indication to the broker that the party acted as *agent* and not on his own account, and therefore the broker has no lien on the policy so effected for his general balance against such agent, as between such broker and the principal.

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on the voyage insured, and meeting with bad weather an average loss was incurred, to recover which this action was brought. At the time of *Jennings's* failure he was indebted to the defendants on the general balance of accounts for premiums on this and other insurances to a greater amount than the average loss in demand in this action, and for which the defendants were accountable; and the question was, Whether they were entitled to retain in this action as having a lien on this sum in their hands for such general balance as between them and *Jennings*? At the trial at the last Sittings at *Guildhall* the jury, by the direction of Lord *Kenyon*, found a verdict for the plaintiff for the amount of the average loss, deducting the amount of the premium upon this policy; his lordship being of opinion that the information conveyed by *Jennings* to the defendants at the time, that the interest was *neutral*, was a sufficient indication to them that he was only acting as agent for another in that transaction, though the principal's name was not then disclosed; and consequently that the defendants had no lien upon the policy as against the plaintiff for their general balance against *Jennings*, but only for the amount of the particular premium. A rule nisi having been obtained for setting aside the verdict and granting a new trial, on the ground of a misdirection in this respect;

Erskine, Park, and Yates, in shewing cause against the rule, urged that the direction to warrant neutral, confirmed also by the name of the ship being foreign, was equivalent to positive information that *Jennings* was only acting as agent for another; as it could not be supposed, if he were acting on his own account, that he should do that which would prevent him from recovering in case
of

of a loss; and that this took the case out of the rule in *George v. Claggett* (a), that if a factor under a del credere commission sell goods as his own, and the buyer know nothing of the principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal.

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Gibbs and *Carr*, in support of the rule, insisted that the mere direction to warrant the property neutral was not conclusive that *Jennings* had no interest in it which he might cover by the insurance. He might have advanced money to the principal for the purchase of the cargo on his account, for which, though the property would thereby become neutral, *Jennings* would have had a lien on the policy; or he might have had such lien for his general balance. At any rate the principal not being disclosed, it must be considered that the credit was given by the defendants solely to *Jennings*.

Lord KENYON C. J. said that he remained of the same opinion as at the trial. If the agent disclose his principal at the time, it is clear that he cannot pledge the property of such principal to another with whom he is dealing for his own private debt. It is true that he did not name him at the time, but he did in effect the same thing by saying it was for a neutral. Supposing the agent had said to the defendants, it is true I am agent for a foreigner, but nevertheless you may retain the money due to him for my debt; could such a transaction be sustained? But that which is now contended for is in effect the same thing.

(a) 7 Term Rep. 359.

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All therefore that the defendants can retain for is the amount of the premiums due on this policy on the part of the plaintiff.

Per Curiam,

Rule discharged.

Thursday,
Feb. 12th.

BUTLER against BUTLER.

Process sued out by the crown against a defendant to recover penalties, upon which judgment for the crown is afterwards obtained, entitles the king's execution to have priority within the stat. 33 H. 8. c. 39. s. 74. before the execution of a subject, whose execution had issued and been commenced on a judgment recovered against the same defendant prior to the king's judgment, but subsequent to the commencement of the king's process: the king's writ of execution having been delivered to the sheriff before the actual sale of the defendant's goods under the plaintiff's execution.

THE following rule was obtained in this cause on a former day of this term: " Upon reading the affidavit of *Luke Turner* it is ordered, that the plaintiff, upon notice of this rule to be given to his attorney and the Solicitor of Excise, shall on, &c. shew cause why the sheriff of the county of *Buckingham* should not be at liberty to pay into court the money now in his hands levied under the writ of fieri facias issued in this cause, after deducting poundage, &c., for the use of the person or persons who shall be found entitled to the same, and that in the mean time proceedings against the said sheriff be stayed." The affidavit referred to stated, that a writ of fi. fa. issued at the suit of the plaintiff, dated 3d *November* 1800, and returnable the 15th, which was delivered at the office of the under-sheriff in *Aylesbury* on the 5th, to levy 704*l.* 4*s.*, on which a warrant was granted the same day, and the defendant's goods taken in execution under it, but for want of buyers remained in the hands of the sheriff till after the return of the writ, who returned accordingly. That an extent (a) at the suit of the crown issued out of the Court of Exchequer upon a judgment recovered there against the defendant, tested the

(a) Properly, an execution at the suit of the crown.

15th of the said *November* and returnable the 28th, which was delivered at the sheriff's office on the 17th, whereupon a warrant was granted to levy 500*l.* That a writ of venditioni exponas at the instance of the plaintiff issued on the 26th of *November*, returnable on *Friday* next after eight days of *St. Hilary*, and was delivered at the sheriff's office on the 29th, and the goods sold under it for 148*l.* 6*s.* That the landlord of the premises had also made a demand for rent due; and that the sheriff was desirous to pay over the money in his hands to whoever should appear legally entitled; both the plaintiff and the solicitor for the Excise having refused to indemnify him, and the plaintiff having ruled him to return the writ of venditioni exponas.

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On the other hand, on shewing cause on the part of the crown, it appeared that the plaintiff's execution issued upon a judgment entered upon a warrant of attorney to confess judgment given just before. That a subpoena issued between the 1st and 3d of *November* last on the part of the king against the defendant, on a prosecution directed by the commissioners of Excise for penalties under the paper act (34 *Geo.* 3. c. 20.) tested 12th *February* 1800, returnable 30th of *April*. That on the 9th *July* following the crown obtained a verdict in the Exchequer for one penalty of 500*l.*, and on the 14th *November* final judgment was entered up. That a writ of execution issued thereon on the 17th, tested the 15th, and returnable on the 28th of *November*, which was delivered to the sheriff on the 17th; to which he returned specially, stating the former proceedings, that he had sold all the defendant's goods under the writ of venditioni exponas issued at the suit of the plaintiff

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in this cause, and that the defendant on the 15th of November last, or afterwards, before the return of the extent, had no other goods on which he could levy.

Erskine on the part of the sheriff referred to *Rorke v. Dayrell (a)*, where it was determined that after goods had been taken in execution on a *fi. fa.* at the suit of a subject against the king's debtor, and before they were sold, an extent at the king's suit grounded on a bond-debt tested after the delivery of the *fi. fa.* to the sheriff came too late. But that at any rate if there were any doubt in this case, the question between the plaintiff and the crown ought not to be litigated at the expence of the sheriff, who therefore desired to pay the money into court.

Espinasse on the part of the plaintiff contended, that the crown was not entitled to any priority in this case; for the statute 33 H. 8. c. 39. f. 74. only directs, that if any suit be commenced or process awarded "for the recovery of any of the king's debts," that such suit or process shall be preferred before the suit of any person: and that the king shall have first execution against any defendant of and for his said debts before any other person; so always that the king's said suit be taken and commenced, or process awarded for the said debt, &c. before judgment given for the said other person. Now here, though the king's process had commenced before the plaintiff's judgment, yet it was not for a debt but for a penalty; and it was not ascertained to be the king's debt till the judgment obtained in the Exchequer on the 14th, which was after the commencement of the plaintiff's execution; and consequently

(a) 4 Term Rep. 402. Vide also *Uppom v. Sumner*, 2 Blac. Rep. 1294.

the king could not insist on his priority, according to the determination in *Rorke v. Dayrell*.

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Law and *Wood* on the part of the crown suggested that the whole proceeding on the part of the plaintiff, who was the defendant's brother, was a collusion between him and the defendant to defeat the crown of the fruits of its prosecution against the latter: and (in answer to a question from the Court whether there were any case of this sort concerning the priority of the crown's suit in respect of penalties) they cited the following case as decisive of the legal objection.

[“ The Attorney-General against *Aldersey* (a). This was
“ an Exchequer information filed against the defendant,
“ a sheriff, for making a false return of nulla bona to an
“ execution on a judgment after verdict on an Exchequer
“ information against *Thomas Harris*, a soap-maker, for
“ excise penalties. The cause was tried at the sittings
“ after *Mich.* term 1785, and the jury gave a verdict for
“ the crown: but a special case was reserved for the opinion
“ of the Court upon the question, Whether under the cir-
“ cumstances the king ought to recover the damages for
“ which the verdict was given? Previous to the issuing
“ of the crown's execution, and at the time of its delivery
“ to the sheriff, his officer was in possession of *Harris's*
“ effects under a fieri facias, at the suit of a subject.
“ The Excise board, in conformity to the invariable prac-
“ tice, having refused to give the sheriff an indemnity, he
“ appropriated the whole of the defendant *Harris's* effects
“ in satisfaction of the subject's fieri facias; and returned
“ nulla bona and non est inventus on the crown's execu-

(a) The counsel for the crown were furnished with this note of the case, which they shortly referred to.

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“ tion. But the Excise Exchequer information having been
“ filed prior to the commencement of the subject’s action,
“ (which was a judgment entered up on a warrant of at-
“ torney to confess it,) the Court, after three very long
“ and solemn arguments, on 26th *November* 1786 adjudg-
“ ed the crown to be entitled to the goods.

“ EYRE B. I suppose there can be no doubt that the
“ sum recovered by the judgment against *Harris* is a debt
“ upon which an action of debt may be maintained.
“ When therefore the crown is enabled to recover in an
“ action of debt, it seems to me difficult to say that the
“ suit is not to recover a debt. I really think this is a
“ case in which the matter of fact decides the point. It
“ being a judgment on the ground of a preceding forfei-
“ ture, that forfeiture constitutes a debt recoverable by an
“ action of debt; then is not the action by which it is re-
“ covered a suit for the recovery of a debt?

“ Lord C. B. SKYNNER. If my brothers clearly consider
“ the case in that light, I can have no hesitation to give my
“ opinion upon it immediately; which is, that the money
“ became a debt which has been so recovered by that suit.
“ The crown was entitled to priority of execution inde-
“ pendent of the statute of *Hen. 8*. Then whatever alter-
“ ation that statute may have made, it certainly has said,
“ that wherever the king’s suit has been commenced for a
“ debt before the subject has obtained judgment, the king
“ shall have the priority of execution. Now here the suit
“ had been so commenced in which judgment was re-
“ covered, which made that a debt for which the execution
“ issued. The case then comes within the words of the
“ statute, adopting the construction which has been put
“ upon it, that it abridged the prerogative; for this was a
“ debt

“ debt prior to the judgment obtained by the private creditor.
 “ ditor.

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“ EYRE D. In truth, a right to the specific sum from
 “ the party attached in the crown upon the crown’s instituting its suit, though not before; for till then another
 “ person might have interposed his suit, in consequence of
 “ which a right to a part of that sum would have attached
 “ in him. But that is excluded by the crown’s having
 “ instituted the suit in the present case. Consider the nature of the right which so attaches; it is to demand from
 “ the party a specific sum of money. Had that sum been
 “ due upon a contract, it would have been a debt in the
 “ ancient idea of a debt. But though due and recoverable from the party upon another ground, it certainly
 “ becomes a debt, because it is allowed to be recovered in
 “ the shape of a debt. The crown recovers it upon a
 “ ground which existed prior to the demand, and
 “ which is in consideration of law a ground for that
 “ demand, without any conviction or previous ascertaining of the forfeiture. It seems to me as if
 “ the argument used on the part of the defendant
 “ would go to this, that this sort of action could not
 “ have been commenced by a common informer, or by
 “ an information by the crown, until the ground of forfeiture had been constituted in some other mode of proceeding. If it were only upon the forfeiture being
 “ ascertained that the right of action accrued or the debt
 “ was created, it must have been ascertained in some other
 “ mode, as by indictment for the offence, or in some other
 “ manner; for that seems the only way in which the case
 “ can be brought to an analogy to the case of forfeiture.

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“ But instead of that, the law authorizes the crown or a
 “ party to demand this as a sum of money due to them, and
 “ make, not the judgment, but the fact of the forfeiture,
 “ the ground of this duty, as it may almost be called. It
 “ becomes a duty, as soon as the crown’s right to it has
 “ attached by the crown’s having instituted its suit. The
 “ only reason why it is not a duty before that time is be-
 “ cause it may go to one or another person. It is indeed
 “ incident to the nature of this demand, that if the party
 “ die before judgment is obtained the suit is abated : but
 “ I do not see that that circumstance alone is a reason
 “ why that which is recoverable in an action of debt is not
 “ a debt : it is a debt of a peculiar sort, a debt liable to be
 “ defeated, and not transferrable before judgment : it is a
 “ debt arising out of a personal transaction : a debt which
 “ by possibility if not pursued up to judgment may never
 “ take effect for the benefit of the party who sues : but as
 “ soon as it has been pursued up to judgment, there is an
 “ end of all those circumstances which counsel have raised
 “ in the question with regard to what is the true nature of
 “ this demand ; it is then ascertained and fixed beyond all
 “ possibility of doubt. That however goes only to the
 “ remedy : the remedy for the recovery of this sort of debt
 “ is liable to be defeated by the accident of the parties
 “ dying before the judgment is obtained. I do not see
 “ that that which as soon as the judgment is pronounced
 “ is confessedly a debt, upon which all the ordinary reme-
 “ dies which the crown has for the recovery of a debt
 “ would immediately attach ; and which proceeds upon a
 “ ground of fact existing before the suit is commenced,
 “ and which is made the ground upon which the suit is
 “ commenced ; I do not see that it is not just as much a
 “ debt

“ debt in the idea of law as a debt which is created by
 “ contract. It seems to me that it is impossible to dispute
 “ upon the face of this record that this is not a debt; be-
 “ cause upon this record which is after judgment none of
 “ those subjects which could create a question upon it are
 “ open: they are all concluded. Here is a demand against
 “ this person proceeded upon till it is impossible it can be
 “ evaded; it is recovered, and being recovered, it is a
 “ debt: so it comes within the letter of the act. I
 “ think we should establish a mischievous precedent if we
 “ were to say, that this class of debts were not debts upon
 “ which the king is entitled to his preference, if the suit
 “ commenced before the subject’s judgment; because
 “ though in this particular case there may not be a fraud,
 “ yet it would be open to practices; and the answer to
 “ that, that it is always open to the question of fraud by
 “ alleging fraud, would involve the revenue in high doubt
 “ and inextricable difficulties; and therefore I am not sorry
 “ that the Court sees a ground upon which it can deter-
 “ mine against the subsequent judgment, which will not
 “ expose those prosecutions to be dealt with in that sort
 “ of way which the ingenuity of gentlemen who are con-
 “ cerned in defending causes of this sort, I am afraid,
 “ would be apt to make very effectual. *Hotbam B.* and
 “ *Perryn B.* declared themselves of the same opinion.”]

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Lord KENYON C. J. said, that the case cited had re-
 moved the only doubt which had floated in his mind.
 And accordingly (the other Judges concurring)

The Rule was discharged.

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The Court at the same time intimating to the sheriff's counsel, that it would be better for him to pay over the money levied in his hands to the crown without further litigation and expence,

Thursday,
Feb. 12th.

BURTON against HARRISON.

Where plaintiff withdraws his record after entering it for trial, the defendant may have judgment as in case of a nonsuit.

THE common rule for judgment as in case of a nonsuit, for not proceeding to trial pursuant to notice, having been moved for in this case,

Wood shewed cause against it; insisting that by the practice of the Court it could not now be granted, the plaintiff having taken down the record to trial and entered it, though he had afterwards withdrawn it. And he cited *King v. Pippet (a)*, where the plaintiff having been nonsuited, which nonsuit was afterwards set aside on a point of law, the Court ruled that judgment as in case of a nonsuit could not be entered on the plaintiff's neglecting to carry the record down to trial a second time, where the defendant might have carried it down by proviso. So in *Menuburn v. Langley (b)*, where the case was made a remanet after being entered for trial, the Court refused the like rule for not proceeding to trial the second time, because the stat. 14 Geo. 2. c. 17. was satisfied by the plaintiff's having once carried the record down to trial.

GROSE J. The words of the statute are, that where the plaintiff "shall neglect to bring such issue on to be tried" the Court may give the defendant the like judg-

(a) 1 Term Rep. 492.

(b) 3 Term Rep. 1.

ment as in case of a nonsuit. But how can it be said that the plaintiff brought the issue on to be tried when the record was withdrawn?

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LE BLANC J. The very point has been already expressly decided in a case of *Reed v. Stone*, E. 36 Geo. 3. (c), where the record having been taken down to trial and entered, but afterwards withdrawn, it was objected that there could not be judgment as in case of a nonsuit: but the Court were of a different opinion upon the words of the statute, and granted the rule. The same point was taken for granted in two other cases; *Raines q. t. v. Spicer* (d), and *Jordaine and Others v. Sharpe* (e).

Wood thereupon consented to give a peremptory undertaking to try; on which terms it was agreed that the rule should be discharged.

Dayrell for the defendant.

(c) Vide 2 Tidd's Prac. 692.

(d) 7 Term Rep. 173.

(e) 2 H. Blac. 282.

IN this term *William Mackworth Praed* Esq. of Lincoln's-Inn was called to the degree of Serjeant at Law. His motto was "*Fœderis æquus dicamus leges.*"

THE END OF HILARY TERM.

C A S E S

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Forty-first Year of the Reign of GEORGE III.

IN the course of the last vacation, the Great Seal was, on the resignation of Lord *Loughborough*, (afterwards created Earl of *Roſslyn*,) immediately delivered to Lord *Eldon*, Lord Chief Justice of the Court of Common Pleas, who was appointed Lord High Chancellor of *Great Britain*. His lordship however continued to preside in the Court of Common Pleas till the appointment of his successor, which did not take place till after this term: when

The Right Honorable Sir *Richard Pepper Arden* Knt. Master of the Rolls, was appointed to succeed him (having first resigned the Rolls) and was created a Peer, by the title of Baron *Alvanley* of *Alvanley*, in the County Palatine of *Chester*.

Sir *John Mitford* Knt. his Majesty's Attorney-General resigned his office before the term, and was elected Speaker of the House of Commons; in whose room

Edward Law Esq., one of his Majesty's Counsel learned in the Law, was appointed Attorney-General, and was knighted.

Sir William Grant Knt. his Majesty's Solicitor-General, resigned at the same time, and was succeeded by

The Honorable *Spencer Perceval*, one of his Majesty's Counsel learned in the Law.

And after the term, *Sir Wm. Grant* was appointed to succeed Lord *Alvanley* as Master of the Rolls, and was sworn of his Majesty's Most Honorable Privy Council.

Friday,
April 21th.

MARTIN *against* VALLANCE.

Where in trespass qu. cl. fr. the defendant pleads not guilty, and a justification of a right of way, and the plaintiff traverses the right of way, and new assigns extra viam; and there is a verdict for the plaintiff, with 1 s. damages on the new assignment, and for the defendant on the justification; the plaintiff is entitled to full costs, deducting the defendant's costs on the issue found for him.

THIS was a rule calling on the plaintiff to shew cause why the Master should not review his taxation of costs. The action was trespass quare clausum fregit: pleas, 1st, not guilty, which was found for the plaintiff; 2^{dly}, a justification of a right of way generally (not setting out the way by metes and bounds) over the locus in quo: replication, traversing the right of way, and new assigning extra viam: issues taken on the right of way and on the new assignment: verdict for the plaintiff on the new assignment, with 1 s. damages, and for the defendant on the right of way. The Master taxed the plaintiff his full costs, deducting the costs of the issue found for the defendant; and the objection was, that the plaintiff was entitled to no more costs than damages. The question was first agitated on the last day of last term, when the Court ordered it to stand over till now.

Wigley in shewing cause, relied on *Affer v. Finch* (a) as in point; the only difference being, that the plaintiff only

(a) 2 Lev. 234. This and other cases on the subject are collected in *Hullock on Costs*, 85. &c.

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replied extra viam, admitting the right of way. But the reason given why the plaintiff should have his full costs was, because the title to the way was in question, namely, *of what extent* it was. The case of *Ibbotson v. Browne* (a) is the only authority which appears the other way; and there the plaintiff, who had a verdict on the new assignment, as here, had no more costs than damages. But it does not appear what the justification was in that case, it might only have been the common bar. The rule however adopted in *Affer v. Finch* has been recognized in subsequent cases; in *Beale v. Moor*, Tr. 15 Geo. 2. (b), and *Cockerill v. Allanson*, Tr. 22 Geo. 3. (c); though a distinction was taken in the latter, that where the way pleaded is set forth by metes and bounds, the new assignment operates like a new action, and then the case amounts to no more than a common action of trespass with damages under 40 s.; and so the plaintiff is not entitled to any more costs than damages, unless the Judge certified under the stat. 22 & 23 Car. 2. c. 9. s. 136. that the freehold or title to the land came in question. This case differs from that of *Griffiths v. Davis* (d), for there there was judgment by default on the new assignment, and all the pleas on which issues were taken, which were justifications for several rights of way, were found for the defendant.

Lawer contra. The finding the justification for the defendant does away the finding of the first general issue for the plaintiff, and then the finding for the latter on the new assignment is no more than equivalent to a verdict in a new action of trespass, and consequently the plaintiff

(a) E. 11 Geo 2. 4to. *Barnes*, 129.(b) 1 *Str.* 1163.(c) *Hullock on Cys.*, 36.(d) 3 *Term Rep.* 465.

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is entitled to no more costs than damages 2 *Ventr.* 180.
195. The case of *Ibbotson v. Browne* before alluded to is
in point, that where there is a verdict for the plaintiff on
the general issue, and for the defendant on the special
justification, the plaintiff is not entitled to full costs.

LE BLANC J. observed, that there was no new assign-
ment in either of the cases in *Ventris*.

The Court on this day, after some further argument,
said, that after the practice had been so long ago settled
by the case of *Affer v. Finch*, which had been followed up
by subsequent determinations, it was now too late to de-
part from it.

Rule discharged.

Friday,
April 24th.

PARKER against ELDING.

Where a public
statute for erect-
ing a Court of
interior jurisdic-
tion enacts that
“no action for
“any debt not
“amounting to
“40s. and re-
“coverable by
“that act shall
“be brought
“against any
“person residing
“within the
“jurisdiction,”
&c. such statute
is a defence upon
the general issue
to a party bring-
ing himself
within it, who
is sued in the
superior Courts.

ASSUMPSIT for the depasturing of cattle, for work
and labour, and on the common counts. At the trial
before Grose J. at the last assizes at *Cambridge*, the plaintiff
failed as to part of his demand, but proved himself entitled
to receive from the defendant 1 l. 18 s. for work and la-
bour, and for agistment. The defence as to so much
was, that the debt was contracted within the *Isle of Ely* by
the defendant residing there, where the plaintiff also
lived at that time, (though the latter had removed at the
time of the action commenced;) and that by the stat.
18 Geo. 3. c. 36. (directed to be deemed a public act) for
the more easy and speedy recovery of small debts con-
tracted within the *Isle of Ely*, a court of requests is consti-
tuted, and it is enacted, “that no action or suit for any
“debt not amounting to 40s. and recoverable by virtue

“ of this act in the said court of requests, shall be brought
 “ against any person residing or inhabiting within the jurisdic-
 “ tion thereof in any of the king’s courts of Westminster,
 “ &c. or elsewhere out of the said court of requests.”

In reply, it was urged on the part of the plaintiff at the trial, that, admitting that the abovementioned clause was strong enough to draw the subject matter of the action within the inferior jurisdiction, because the defendant resided there, although the plaintiff did not; which was contrary to the usual rule in such cases (a); more especially as a subsequent clause gave treble costs against the plaintiff in case he was nonsuited or a verdict passed against him, a provision which seemed to imply that he also must reside within the jurisdiction; yet at any rate such an objection to the jurisdiction could not be taken on the general issue, but ought to have been specially pleaded; for otherwise it is a surprise upon the plaintiff, as he might not know that the defendant lived within the peculiar jurisdiction at the time of the contract made. The learned Judge however thought the objection to the action well founded, and a verdict was taken for the defendant, with liberty to the plaintiff to move to set it aside and enter a verdict for the 1*l.* 18*s.*, if the Court should be of a different opinion.

(a) In *Webb v. Brown*, 5 *Term Rep.* 535. it was holden, that a citizen and freeman of London, not resident therein, having a demand under 40*s.* for goods sold against another citizen and freeman who is resident, is not bound to sue in the Court of Requests pursuant to the statute 14 *Geo.* 2. c. 10. But upon reference to that statute it will appear that the words of the enacting clause are very different from those in the present case, and that they only apply to cases where both the parties reside within the inferior jurisdiction. But it is sufficient to entitle a plaintiff to sue in the county court that the cause of action arises and the defendant resides within the county. *Wells v. Troughton*, 2 *H. Blac.* 29. and *Tubb v. Woodward*, 6 *Term Rep.* 175.

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Wilson now moved for a rule for that purpose, upon the ground before stated.

LORD KENYON C. J. Some acts of parliament, giving a peculiar jurisdiction, require that it shall be pleaded, in case the parties claiming the privilege shall be sued elsewhere; and others direct that a suggestion shall be entered on the roll; and in those cases the methods pointed out by the respective statutes must be pursued. But here is a general law, of which we are bound to take notice, which says, that no action shall be brought against any person residing within the jurisdiction for any debt not amounting to 40*s.*, and recoverable by virtue of that act. The demand in question is of that sort. How then can we say that the plaintiff shall recover it against the positive direction of the act? This being directed to be taken as a public act is part of the general law of the land, of which the plaintiff must be deemed to have notice, and therefore cannot object to being surprised. He must also know in fact with whom he contracted, and on what account.

Per Curiam,

Rule refused (a).

(a) In *Taylor v. Blair*, 3 *Term Rep.* 452. under a similar provision in an act of parliament creating a Court of Requests in Westminster for causes under 40*s.*, which enact that the defendant sued elsewhere *may* plead, &c. Lord Kenyon intimated an opinion, that even on the general issue, if the objection were made at the trial, the plaintiff might be nonsuited. In *Shipman v. Henbest*, 4 *Term Rep.* 109. it was not necessary to determine this point, because the Court there held that the jurisdiction of the superior Courts was not taken away.

REED *against* JACKSON.Saturday,
April 25th.

TRESPASS for breaking and entering the plaintiff's close called *the Marsh*, situate at the parish of *Holme Cultram* in the county of *Cumberland*. Pleas, the general issue, and several justifications; 1. for a common public footway in, through, over, and along the locus in quo; 2. for a public carriage-way; 3. for an occupation-way to and from the defendant's house over the locus in quo to a certain bridge; 4. for a customary-way for all the inhabitants of a certain side of the parish to and from their respective dwelling-houses over the locus in quo to the same bridge, and from thence to the parish church. The replication traversed these several rights of way, and new assigned other trespasses extra vias. The rejoinder took issue on the several traverses, and pleaded the same justifications to the trespasses newly assigned, to which the plaintiff protesting, &c. replied *de injuria*, &c.; on all which issues were taken.

A verdict against one defendant in trespass upon an issue of a justification of a public right of way, negating such right, is evidence in trespass for breaking and entering the same close against another defendant who justified under the same right; and the latter cannot shew that such verdict was entered upon that particular plea by mistake of the officer, there having been no evidence given on either side in respect of that issue on the former trial; the record being conclusive as to the fact of such a finding, though not as to the truth of it between other parties.

At the trial before *Graham B.* at the last Summer assizes at *Carlisle*, the plaintiff's counsel, in order to negative the existence of a public footway, tendered in evidence a record of another action brought by the same plaintiff against one *Brown* for a trespass in the same close described in the present declaration, to which amongst others there was a similar plea of justification for a common footway over the locus in quo, and another justification for a prescriptive easement to go upon the land to wash and shear sheep at shearing time in right of a certain messuage, &c.; which justifications were traversed, and the issues thereon found for the plaintiff, negating the right of way, and the easement last mentioned. It was objected by the defendant's

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counsel, 1st, that the record was no evidence between these parties, being *res inter alios acta*; which objection being over-ruled, though the evidence was holden not to be conclusive, the defendant then offered to shew, that no evidence was entered into upon the trial of that cause respecting the issue upon the public footway, but merely as to the easement of washing sheep, and therefore that the finding of the jury upon the first was mistakenly indorsed on the *postea*. The learned Judge however rejected this evidence, and the plaintiff obtained a verdict.

Cockell Serjt. in *Michaelmas* term last obtained a rule, calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial granted: and in *Hilary* term the case was shortly touched upon by *Larw*, (now Attorney-General,) who insisted that the record in the former action was admissible in evidence against the present defendant, though no party thereto, the right claimed being for a *public* footway, which was matter of common notoriety. The case was ordered to stand over till this term: And

Park and *Littledale* were now called upon to support the rule, who relied principally upon the case of *Lewis v. Clarges* (a) to shew that a verdict could not be given in evidence unless between the same parties; for otherwise a man would be bound by a decision where he had no opportunity to cross examine the witnesses. But though it were admissible, at any rate it was competent to the defendant to shew that the indorsement on the *postea* was

(a) A trial at bar, Easter term 1700, *Gilbert's Law of Evidence*, 29.
 Vide *Sherwin v. Clarges*, *Bull. Nisi Prius*, 332.

made by mistake of the officer; the matter of that issue respecting the footway having passed sub silentio, and the trial having altogether proceeded upon the issue respecting the easement of washing sheep.

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LORD KENYON C. J. I think the judge's direction was right upon both points. The record was admissible evidence, though between other parties, as to the finding upon the right to the public footway, which was negatived. The defendants in both cases stood in the same relative situation. In the case of customary commoners, a verdict in an action for or against one is evidence for or against another claiming in the same right. So in other cases (*a*) of public prescription. What weight the evidence was entitled to is another question; perhaps not to much; and certainly it was not conclusive. But the evidence offered by the defendant went to impeach the authenticity of the record as to the fact of such a finding, and therefore was not admissible.

GROSE J. assented.

LAWRENCE J. Reputation would have been evidence as to the right of way in this case; a fortiori therefore, the finding of twelve men upon their oaths.

LORD KENYON C. J. agreed, that reputation was evidence with respect to public rights claimed, as in this case; but not with respect to private rights.

LE BLANC J. assented.

Rule discharged.

(*a*) In the case of customary tolls, vide *The City of London v. Clerke*, *Cartb.* 181.

Saturday,
April 25th.

CARY *against* LONGMAN and REES.

An action lies to recover damages for pirating the new corrections and additions to an old work.

THIS was an action on the case for pirating a book of the plaintiff's. The first count of the declaration stated, that the plaintiff was the author of a certain book intitled, "*Cary's New Itinerary, or an accurate Description of the great Roads both direct and cross throughout England and Wales, &c. from an actual Admeasurement made by Command of his Majesty's Postmaster-General,*" &c.; and that being the author of the said book within fourteen years last past he had published the same for sale, &c. That the defendants intending to deprive the plaintiff of the profit thereof, and of the benefit of his copy-right, injuriously published and exposed to sale divers copies of a certain book intitled, "*A new and accurate Description of all the direct and principal Roads, &c. from a late actual Admeasurement made by Command of his Majesty's Postmaster-General,*" &c. *which same book had before that time been wrongfully and injuriously copied from the said book of the plaintiff,* without his consent, &c. The second count laid it thus; *great part of which said book* had been before that time wrongfully and injuriously copied and pirated *from the said book* of the plaintiff, without his consent, &c. The third count laid, that the plaintiff was the *proprietor* of *Cary's Itinerary, &c.* The sixth count laid, that the plaintiff had the sole right of printing certain matters relating to the roads of this kingdom, &c. first published within fourteen years last past in a certain book of the plaintiff's called, &c.

At the trial before Lord Kenyon at *Westminster*, it appeared that the original foundation of both the plaintiff's
and

and defendants' books was a work first published in 1771, by Mr. *Patterson*, the copyright of which in 1783 (the author being then living) became vested in Mr. *Newberry*. This work had gone through several editions, the 11th of which was published in 1796. In 1797 the plaintiff was employed by the Postmaster-General to make an actual survey of the principal roads; and the book published by him with their permission contained many material corrections of and additions to the last edition of the original work by *Patterson*. The principal of these consisted in some corrections of distances by the actual surveys; in an admeasurement of the distances from inn to inn in the several post towns, in addition of those from one town to another; in an index to the roads more copious than the former one; in an additional number of gentlemen's seats by the road side; in a rejection of some routes, and an addition of many others. On the other hand, the work published afterwards by the defendants as the 12th edition of the original work by *Patterson* appeared to have been copied, nine tenths of it, verbatim from the plaintiff's improvements, and many of the alterations merely colourable. After verdict for the plaintiff,

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Gibbs moved for a new trial on the ground that the stat. 8 Ann. c. 19. s. 1., granting the copy-right to authors for a certain time, only enacts, "that the *author of any book*" and his assigns shall have the sole liberty of printing "*such book* for 14 years," &c. And though he could not deny that the defendants had copied the alterations of and additions to the original work, introduced by the plaintiff in his Itinerary, in the same manner as he himself had copied the original work, yet he could not be considered as the

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the *author of the book* within the meaning of the statute, the greater part of it having been before published by another person, and to which the plaintiff had no title.

Lord KENYON C. J. Certainly the plaintiff had no title on which he could found an action to that part of his book which he had taken from Mr. *Patterson's*; but it is as clear that he had a right to his own additions and alterations, many of which were very material and valuable; and the defendants are answerable at least for copying those parts in their book. That the defendants had pirated from the plaintiff's book was proved in the clearest manner at the trial; nine tenths at least of the alterations and additions were copied verbatim. The printed work itself was made use of by the defendants at the press, some of it clipped with scissars, with a few slips of paper containing MS. additions interspersed here and there, and some of these merely nominal and colourable. The courts of justice have been long labouring under an error, if an author have no copy-right in any part of a work unless he have an exclusive right to the whole book. I remember it was thought otherwise in the case of Mr. *Mason* (*Mason v. Murray*). Several of Mr. *Gray's* Poems had been for many years before published, which were collected by Mr. *Mason*, and published with the addition of several new poems: but though he had not a property in the whole book, yet the defendant having copied the whole, the Lord Chancellor (a) granted an injunction against him as to the publication with the additional pieces. So Lord *Hard-*

(a) Q. Lord Bathurst?

wicke in another case (*b*) granted an injunction to restrain the defendants from printing *Milton's Paradise Lost*, with *Dr. Newton's Notes*; although there was no doubt but that they

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(*b*) *Tonson v. Walker and another*, 30th April 1752, cited in *Millar v. Taylor*, 4 Burr. 2325. 2353. and in *Tonson v. Collins*, 2 Blac. 332.

Vide *Motte v. Falkner*, Nov. 1735, before Lord Talbot, cited in 4 Burr. 2353 and in 1 Blac. Rep. 331. and *Carman v. Bowles*, 2 Bro. Cc. Caf. 80. relative to the original publication in question.

SAYRE and others *v.* MOORE, Sittings after Hil. 1785, at Guildhall, cor. Lord Mansfield C. J.—This was an action for pirating sea charts; which are protected by statute 71 Geo. 3. c. 57. The charts which had been copied were four in number, which *Moore* had made into one large map.

It appeared in evidence that the defendant had taken the body of his publication from the work of the plaintiffs, but that he had made many alterations and improvements thereupon. It was also proved that the plaintiffs had originally been at a great expence in procuring materials for these maps. *Delaruebet*, an eminent geographer and engraver, had been employed by the plaintiffs in the engraving of them. He said that the present charts of the plaintiffs were such an improvement on those before in use as made them an original work. Besides their having been laid down from all the charts and maps extant, they were improved by many manuscript journals and printed books and manuscript relations of travellers: he had no doubt the materials must have cost the plaintiffs between 3000*l.* and 4000*l.*, and that the defendant's chart was taken from these of the plaintiffs, with a few alterations. In answer to a question from the Court, Whether the defendant had pirated from the drawings and papers, or from the engravings? he answered, from the engravings. *Winterfelt*, an engraver, said he was actually employed by the defendant to take a draft of the Gulph Passage (in the West Indies) from the plaintiffs' map.

Many witnesses were called on behalf of the defendant, amongst others a Mr. Stephenson and Admiral Campbell. Mr. Stephenson said he had carefully examined the two publications; that there were very important differences between them, much in favour of the defendant's. That the plaintiffs' maps were founded upon no principle; neither upon the principle of the Mercator, nor the plain chart, but upon a corruption of both. That near the Equator the plain chart would do very well, but that as you go
further

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they were at liberty to have published the original work itself without the notes.

Per Curiam,

Rule refused.

further from the Equator, there you must have recourse to the Mercator. That there were very material errors in the plaintiffs' maps. That they were in many places defective in pointing out the latitude and longitude, which is extremely essential in navigating. That most of these, as well as errors in the soundings, were corrected by the defendant. Admiral Campbell observed, that there were only two kinds of charts, one called a plain chart, which was now very little used; the other, which is the best, called the Mercator, and which is very accurate in the degrees of latitude and longitude. That this distinction was very necessary in the higher latitudes, but in places near the Equator it made little or no difference. That the plaintiffs' maps were upon no principle recognized among seamen, and no rules of navigation could be applied to them; and they were therefore entirely useless.

Lord Mansfield, C. J. The rule of decision in this case is a matter of great consequence to the country. In deciding it we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. The act that secures copy-right to authors guards against the piracy of the words and sentiments; but it does not prohibit writing on the same subject. As in the case of histories and dictionaries: In the first, a man may give a relation of the same facts, and in the same order of time; in the latter an interpretation is given of the identical same words. In all these cases the question of fact to come before a jury is, Whether the alteration be colourable or not? there must be such a similitude as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript. So in the case of prints, no doubt different men may take engravings from the same picture. The same principle holds with regard to charts; whoever has it in his intention to publish a chart may take advantage of all prior publications. There is no monopoly of the subject here, any more than in the other instances; but upon any question of this nature the jury will decide whether it be a servile imitation or not. If an erroneous chart be made, God forbid it should not be corrected even in a small degree, if it thereby become more serviceable and useful

1801.

SMITH and Others, Assignees of RICHARDSON, a
Bankrupt, *against* STOKES.*Tuesday,*
April 23th.

IN trover for goods, to which the general issue was pleaded, a verdict was taken for the plaintiffs at the trial before Lord *Kenyon* C. J. at *Westminster*, after last *Michaelmas* term, damages 24*l.* 4*s.*, subject to the opinion of the Court on the following case.

After an act of bankruptcy committed by one of two partners, joint effects are sent away, which come to the defendant's hands; then the solvent

partner dies, leaving the defendant his executor; and afterwards a commission of bankruptcy is taken out against the surviving partner, and his estate assigned to the plaintiffs: held that they are tenants in common with the solvent partner, and after his decease with his representatives by relation of law from the act of bankruptcy; and cannot therefore maintain trover against the defendant claiming under such solvent partner.

The

useful for the purposes to which it is applied. But here you are told, that there are various and very material alterations. This chart of the plaintiffs' is upon a wrong principle, inapplicable to navigation. The defendant therefore has been correcting errors, and not servilely copying. If you think so, you will find for the defendant; if you think it is a mere servile imitation, and pirated from the other, you will find for the plaintiffs.

Verdict for defendant.

DR. TRUSLER v. MURRAY, Sittings after Mich. 1789, cor. Lord *Kenyon*.—This was an action for pirating a book of Chronology. It was proved by the plaintiff, that though some parts of the defendant's work were different, yet in general it was the same, and particularly from page 20 to 34 it was a literal copy.

Lord *Kenyon*, C. J. was of opinion, that if such were the fact the plaintiff must recover, though other parts of the work were original. He said Lord Bathurst had been of that opinion, and he thought rightly with respect to the publication of some original poems by Mr. Macon, together with others which had been before published. And the like with respect to an Abridgment of Cook's Voyage round the World. The main question here was; Whether in substance the one work is a copy and imitation of the other; for undoubtedly in a chronological work the same facts must be related. The parties having received his lordship's opinion, it was agreed to refer the consideration of the two books to an arbitrator, who would have leisure to compare them.

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The bankrupt *Richardson* and one *Strickland* were partners in trade. On the 29th *January* 1800 *Richardson* committed an act of bankruptcy. On the 31st of the same month the goods in question, being partnership effects, were sent to *Monmouth* directed to *A.* and *B.*, and were received by the defendant, and which before the action brought were demanded by the plaintiffs of the defendant, who refused to deliver the same. On the 8th of *February* 1800 a commission of bankrupt, on the petition of *S. G.* and others who were creditors of *Strickland* and *Richardson*, was issued against *Richardson* only. On the 14th of the same month of *February* *Strickland* died, having made his will, and appointed *Stokes* and *Wesson* his executors, who have since proved the same. *Strickland* never committed any act of bankruptcy. On the 7th of *March* 1800 the commissioners acting under the commission of bankrupt against *Richardson* executed an assignment of his effects to the plaintiffs, who were duly chosen assignees. The question was, Whether the plaintiffs were entitled to recover in this action?

Turnor, for the plaintiffs, admitted, that if the defendant, as the representative of *Strickland* the deceased partner, stood in the relation of tenant in common of the property with the plaintiffs, the action could not be maintained: but he contended, that upon *Strickland's* death the whole legal interest in the partnership property, which was before then holden in joint tenancy, survived to the bankrupt his remaining partner, and was upon his bankruptcy transferred by the assignment to the plaintiffs; although by the law merchant they were accountable for a moiety to the representatives of the deceased partner. The property

perty was originally vested in the two partners as joint tenants, and nothing happened during the life of *Strickland* to convert their title into a tenancy in common; for he died before the commissioners' assignment was made, and consequently before the bankrupt laws had attached upon the legal title of the bankrupt so as to destroy the joint tenancy. The act of bankruptcy, which happened before *Strickland's* death, could not of itself operate to dissolve the joint-tenancy, or sever the title of the parties, and convert it into a tenancy in common. This was evidently the opinion of the Court in *Fox and others assignees v. Hanbury (a)*; for they there held, that after a secret act of bankruptcy by one partner, the other still continued to have a control over the partnership effects, and might convey a title to a third person: whereas if the act of bankruptcy of one operated so as to convert the joint tenancy into a tenancy in common, the solvent partner could only have made a title to a moiety. Lord *Mansfield* indeed there said, that the act of bankruptcy of one partner is to many purposes a dissolution of the partnership by virtue of the relation in the bankrupt laws; but that is merely to avoid all intermediate acts of the bankrupt himself to the prejudice of his creditors, and cannot vary the title by which he holds his property, and which must be governed by the general principles of law. It is the assignment under the statutes which dissolves the partnership, and that is effected by the actual transfer of the commissioners, who have themselves no interest in the property, but a bare power to transfer. If then before the assignment the joint tenancy continued to subsist in point of law notwithstanding the act of bankruptcy, the

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(a) *Corop.* 415.

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whole legal title and right of action for any conversion of the property during the joint tenancy survived to the bankrupt upon the death of his partner by the mere operation of the common law (a), though accountable to the deceased's representatives for a moiety of the beneficial interest, according to *Wyll v. Skip* (b): and that interest which devolved upon the bankrupt by operation of law after the act of bankruptcy, and before the assignment, passed by the commissioners' assignment to the plaintiffs, subject to the same account. The relation back of the assignment to the act of bankruptcy, in order to avoid mesne acts of the bankrupt, is by force of the bankrupt laws, and is quite distinct in its operation from the change of title effected in the property by such assignment, from a joint tenancy to a tenancy in common, which results from the rules of the common law in consequence of the conveyance, and which has no relation back. But at the time of the assignment the whole legal interest was in the bankrupt, and consequently was all conveyed to the assignees.

Onflow Serjt. contra was stopped by the Court.

LORD KENYON C. J. I do not understand how the assignees of the bankrupt could take the whole legal interest in this case, without which it is admitted that the action is not maintainable against the defendant. If indeed pro-

(a) *Co. Litt.* 193.

(b) 1 *Wyl.* 242. See also *Martin v. Crum*, *Salk.* 444. 1 *Ld. Ray.* 340. Two joint merchants make B. their factor; one dies leaving an executor; this executor and the survivor cannot join; for the remedy survives but not the duty; and therefore on recovery he must be accountable to the executor for that.

perty be left in the hands of a bankrupt partner at the time of the bankruptcy, the assignees are entitled to take possession of the whole and sell it, but they must account for a moiety to the other partner. As in the case of *Heydon v. Heydon (a)*, where it was holden that under an execution against one of two copartners, the sheriff must seize all, and not merely a moiety of the goods sufficient to cover the debt; because the moieties are undivided, and he must sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner. In this case it was not the act of bankruptcy alone that dissolved the joint tenancy, but the act of bankruptcy followed up by the commission and assignment. Nothing passes to the assignees till the assignment; but when that is executed, they are in by legal relation to the time of the act of bankruptcy, according to *Cooper v. Chitty (b)* and many other cases. This is the essential object of the bankrupt laws, and the uniform operation of them, with the single exception of the king's prerogative in regard to extents against the bankrupt's property, which bind from the teste of the writ and till the actual assignment of the commissioners; wherefore a provisional assignment is sometimes made in order to protect the bankrupt's property from the expected process of the crown. In all other instances the relation takes place. The effect of it then in this case is, that the assignees became tenants in common by relation from the time of the act of bankruptcy with the other partner in his lifetime, and since his decease with his representatives, one of whom is the present defendant:

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Assignees, &c.
against
STOKES.
(a) *Salk.* 372.(b) 1 *Burr.* 20.

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and then the rule of law attaches, that one tenant in common cannot maintain trover against another.

Per Curiam,

Postea to the Defendant (a).

(a) Vide *Hague v. Rolleston*, 4 Burr. 2176. and vide the next case.

Tuesday,
April 28th.

SMITH and Others, Assignees of RICHARDSON, a
Bankrupt, against ORIELL.

After an act of bankruptcy committed by one partner the other delivers goods of their joint property to a creditor for a joint debt and dies, and afterwards a commission issues against the surviving partner: held that the creditor by virtue of such delivery by the solvent partner became tenant in common of the goods with the assignees of the bankrupt by relation from the act of bankruptcy which was in the lifetime of the solvent partner; and consequently that the assignees cannot maintain trover against such creditor.

THESE were the same plaintiffs as in the last case, but the situation of this defendant was in some respect different from the other. The case here stated,

That on the 29th January 1800 the bankrupt was in partnership with *Strickland*, and they were possessed of partnership property, of which the goods in question in this action of trover are part; and as such partners, were in insolvent circumstances. That on that day *Richardson* committed an act of bankruptcy by absconding. That on the 8th of February following a commission of bankrupt, on the petition of S. G. and others, who were creditors of *Strickland* and *Richardson*, was issued against *Richardson* alone. That on the 12th of the same February the goods in question, being part of the aforesaid partnership property, were delivered to the defendant by the desire of *Strickland*, in satisfaction of several debts antecedently due to him from *Strickland*, and also from *Richardson*. That on the 14th of the same month *Strickland* died. That on the 15th, the commissioners acting under the commission against *Richardson* executed a provisional assignment to the messenger, and on the 7th of March following executed an assignment of the bankrupt's effects to the plaintiffs. That there was a demand and refusal of the goods.

Giles,

Giles, for the plaintiffs, attempted to distinguish this from the former case, because the present defendant was a stranger, and not as in that case the legal representative of *Strickland* the partner of the bankrupt. And though in strictness the executors of the deceased partner ought to have been joined in the action with the plaintiffs, yet according to the case of *Addison v. Overend* (a), advantage can only be taken of the omission by a plea in abatement. But by

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and Others,
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Lord KENYON C. J. If *Strickland* delivered the property over to the defendant *bonâ fide* for a debt, which must be taken to be the case here, the latter stands in the same situation as *Strickland* himself would have done. By such a delivery without fraud the legal property was transferred; and therefore there is no distinguishing this case from the former.

Per Curiam,

Postea to the Defendant.

(a) 6 Term Rep. 766. That was trespass for running down a ship.

SOLOMONS *against* LYON.

Tuesday,
April 28th.

TO an action of assumpsit for 40*l.* the defendant pleaded, that before the commencement of the plaintiff's suit and in the lifetime of one *M. R.* now deceased, and whom the defendant hath survived, viz. in *Michaelmas* term, 37 *Geo.* 3. the plaintiff came in person into the court of Exchequer, &c. and then and there before the

To a plea of set-off of a sum due under a recognizance, and also of another sum upon a simple contract, it seems that a replication, protesting that the plaintiff did not

acknowledge, &c. and then pleading that he was not indebted in manner and form as the defendant had in pleading alleged, and concluding to the country, is bad; inasmuch as it refers matter of record to the cognizance of a jury. But as it was a sham plea the plaintiff had leave to amend without payment of costs.

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Barons acknowledged himself to owe to the said *M. R.* and the defendant 15 *l.* 10 *s.*, which said recognizance still remains in full force; and the said 15 *l.* 10 *s.* at the time of the commencement of this suit was and still is due and owing from the plaintiff to the defendant, as surviving partner of *M. R.*, as by the said recognizance *still remaining of record of the said court, &c.* fully appears. And the defendant further says, that the plaintiff at the commencement of this suit was and still is indebted to him in other 26 *l.* 5 *s.* upon a certain order for payment of money made by the plaintiff to the defendant, &c.; which said several sums of 15 *l.* 10 *s.* and 26 *l.* 5 *s.* exceed the several sums in the declaration mentioned and supposed to be due, &c. out of which the defendant is ready and offers to set off and allow to the plaintiff all the damages sustained by reason of the non-performance of the promises in the declaration mentioned, according to the form of the statute, &c. Wherefore he prays judgment, &c. Replication, protesting that the plaintiff did not acknowledge himself to owe to the said *M. R.* and the defendant the said sum of 15 *l.* 10 *s.* &c. in manner and form as the defendant has in his plea, &c. in that behalf alleged; for replication says, that he the plaintiff is not nor at the commencement of this suit was indebted to the defendant in manner and form as the defendant hath above in pleading alleged, *and this he prays may be inquired of by the country, &c.* To this there was a special demurrer, assigning for cause that the plaintiff had concluded his replication to the country, although the plea to which such replication was made is founded upon matter of record, and can only be tried by production or non-production of the record therein mentioned, &c. And also, for that the plaintiff in his replication does not deny the existence of the record of recognizance

in

in the said plea mentioned, nor in any way discharges himself therefrom.

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Reader in support of the demurrer. The plea of set-off consists partly of matter of record, and partly of matter of fact; the replication therefore by concluding to the country as to the whole attempts to draw matter of record to the cognizance of a jury; as to which the plaintiff should have replied *nul tiel record*. This cannot be distinguished from the common case, where the plaintiff declares in debt on a judgment and also on a bond; there a plea of *nil debet* to the whole would clearly be bad. If the whole sum set off had been founded on the recognizance, the plaintiff must have replied *nul tiel record*; then because other matter is joined to which *nil debet* is a good plea, that will not make it good for the rest to which it is no answer. So if instead of there being but one plea, containing distinct matters, there had been two distinct pleas, there must have been distinct and different replications; then the joining the two matters in one plea in order to avoid prolixity, will not alter the nature and substance of the replication in answer. But it may be argued, that this replication admits the recognizance, and only takes issue on the simple contract debt *ultra* the sum in the recognizance that however is not warranted by the form of the pleading; for the plaintiff says, "that he was not indebted to the defendant *in manner and form as the defendant hath above in pleading alleged*," which includes the whole. If the *protestando* had not been introduced, the replication would not have been an answer to the whole plea: but the *protestando* does not admit the sum due under the recognizance. Then because the replica-

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tion is no answer to part of the plea, it cannot be taken to be an admission of so much. And he cited *Furdon v. Weeks*, 3 *Lev.* 64.

Scott contrà insisted, that under this replication payment might have been given in evidence which was triable by the country : but he also contended, that a recognizance not enrolled, which for aught appeared was the case here, was not matter of record nor pleadable as such, but was of no higher nature than a bond. *Bottomley v. Lord Fairfax*, 1 *P. Wms.* 334. and 2 *Vern.* 750.

Lord KENYON C. J. observed, that the plea stated, “ as by the said recognizance *still remaining of record of the said court*, &c. fully appears ;” which raised a difficulty in that part of the argument ; and therefore proposed to the plaintiff’s counsel to amend the replication.

Scott then prayed leave to amend without payment of costs ; suggesting that this was a sham plea filed by the defendant. And

The Court, after some consultation, said, that for the sake of justice, which was much abused by the practice of sham pleading, and by way of precedent in future in order to discountenance the attempt, they would grant a rule calling on the defendant to shew cause why the plaintiff should not have leave to amend without payment of costs ; which rule should be made absolute, unless an affidavit was made of the truth of the facts pleaded. But it being admitted on the part of the defendant, to save
 expence,

expence, that it was a sham plea, the Court gave the plaintiff in the first instance,

A Rule absolute to amend without Payment of Costs (a).

(a) Vide *Pierce v. Blake*, *Salk.* 515. where the Court threatened to fine an attorney for false pleading.

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The KING *against* The Inhabitants of NUNEHAM COURTNEY. *Wednesday, April 29th.*

TWO justices, by an order made on the 4th of *June* 1799, removed *Francis Jennings* and *Elizabeth* his wife from *Burcot* to *Nuneham Courtney*, both in the county of *Oxford*. The Sessions on appeal confirmed the order, and stated specially, for the opinion of this Court, that the pauper *F. J.* was about 19 years old, and was married to the said *Elizabeth* in the year 1799, before the date of the said order; and that between the notice of appeal against the order and the then next sessions the pauper absconded, leaving his wife, and has not since been heard of. And that the officers of *Burcot* have used all due diligence to find him, in order to have him examined as a witness at the hearing of the appeal, but without success. That the pauper was employed in the service of *W. Costar* in *Nuneham Courtney* as a boy to drive his team during the period of 11 months, between *Michaelmas* 1794 and *Michaelmas* 1795: and in order to prove that the pauper was legally settled in *Nuneham Courtney*, the respondent parish of *Burcot* offered in evidence an examination in writing of the pauper, which examination was first taken upon the oath of the pauper on the 4th of *June* 1799 by one magistrate, upon the complaint of the churchwardens and overseers

An ex parte examination in writing of a pauper, taken on oath before two magistrates, for the purpose of removing him to the place of his settlement, is not admissible in evidence upon an appeal against an order of removal, on the ground of the pauper's having absconded between the notice of appeal and the trial of it before the Quarter Sessions; although the respondents had used due diligence, but without effect, to procure the attendance of the pauper as a witness, he not having been heard of from the time of his absconding.

of

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of the poor of *Burcot*, and which examination was on the day of the date of the said order read over to the pauper by the same and another magistrate, before whom the pauper was then taken by the churchwardens and overseers of *Burcot*, in order to be removed to the place of his settlement; and to the truth of the contents of which examination the pauper then made oath before the justices, who thereupon made the said order. But it appeared, that no person belonging to *Nuneham Courtney* was present at either of the beforementioned times; whereupon the appellants objected to the admissibility of this examination in evidence. But the court of quarter sessions over-ruled the objection, and received the examination in evidence; by which it appeared that the pauper, after stating the place of his birth, which was in *Sandford*, deposed, that he hired himself at *Abingdon* fair some days before *Michaelmas* 1794, as a servant to the said *William Costar*, farmer in *Nuneham Courtney*, for a year, to lodge in his house, and to be paid 3*s.* and 6*d.* per week for the first half of that year, and 4*s.* per week for the second part, and to be found in victuals for five weeks in the harvest; and that he served that year, and received his wages accordingly. He then stated several other hirings and services to persons in other parishes, none of which was for a year, and concluded by saying he had done no other act to gain a settlement. And the Court thinking this examination to be sufficient proof of the pauper's settlement in *Nuneham Courtney*, did for that reason confirm the order.

This case first came on to be argued in last term, when the Court without hesitation expressed a decided opinion against the admissibility of the evidence. But it stood

flood over by desire of the respondent's counsel.
And now

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Erskine for the respondents, in answer to a question put to him by the Court, admitted that he had no argument to adduce by which he could expect to alter the opinion which the Court had before intimated.

Per Curiam, Both Orders quashed (a).

The Attorney-General and *Abbott* were to have argued for the appellants.

(a) In the case of *The King v. The Inhabitants of Erpsell*, 3 Term Rep. 707. where the Court were equally divided upon the admissibility in evidence of such an *ex parte* examination, the affirmative opinion was grounded on a presumption that the pauper was dead, or, what was admitted to be equivalent, was insane.

ELAND *against* KARR and Others.

Friday,
May 1st.

IN assumpsit, the plaintiff declared, that the defendants on the 31st of *March* 1800 were indebted to him in 500*l.* for goods before that time sold and delivered to them, for which they promised to pay on request; also upon a quantum meruit, and on the common money counts; and then alleged a request, and a breach. Pleas, non assumpsit as to all but 51*l.*, and as to that a tender; 2dly, a set-off upon various bills of exchange, (the latest of which became due the 14th of *March* 1800,) and also for money had and received. Replication to the plea of set-off, as to the promises laid in the first and second counts, that at the time of the sale of the said goods, viz. on the 22d of *March* 1800, it was agreed between the plaintiff

In assumpsit for goods sold and delivered, defendant pleaded a set-off of more money due to him from the plaintiff. Replication, that the goods were agreed to be paid for in ready money: which replication was holden bad on demurrer, being no answer to the plea.

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plaintiff and defendants that the defendants should pay to the plaintiff for the said goods *in ready money*, and this they are ready to verify, &c. And as to the rest, the plaintiff admits the tender, and takes the money out of court. General demurrer to the replication to the two first counts, and joinder.

J. B. Warren in support of the demurrer. The replication either states a contract materially different from that in the declaration, in which case it is a departure; or else it states one substantially the same: in either case it is no answer to the plea of set-off. An agreement to pay for goods in ready money admits of a set-off in the same manner as any other debt. The agreement to pay for the goods on delivery is merely to ascertain the time of payment.

The Court then asked the counsel for the plaintiff what possible objection could be made to the plea?

Marryat contra said, that he meant to contend that a party who contracts to pay for goods in ready money could not substitute any other mode of payment; and that this was an attempt to substitute the set-off of another debt in lieu of money; and that too in a case where the damages were unliquidated. That there was a known difference between a ready-money price and a price upon credit; and here the defendant obtained the goods at the lesser or ready-money price, and now attempts to avail himself of a mode of payment adapted to a credit price. But

The

The Court decided, that as at the time of the commencement of the plaintiff's action, which was the time to be regarded, there was a debt due from the plaintiff to the defendant, the latter was entitled under the statute 2 Geo. 2. (a) to set it off. That no objection arose from the damages being unliquidated, for that was the case in all actions of assumpsit, when damages are claimed for a breach of contract in nonpayment of money. That the form of the plea was an order to set off and allow out of the debt due to the defendant so much as the damages sustained by the plaintiff amounted to by the defendant's not performing his promises; and in estimating the plaintiff's damages in this case, the jury would take into their consideration the loss he had sustained by non-payment of the ready money.

Judgment for the Defendant,

(a) c. 22. s. 13. explained by stat. 8 Geo. 2. c. 24. s. 4.

WRIGHT *against* RATTRAY.

Friday,
May 1st.

THIS was an action upon the case for obstructing the plaintiff in his use of a way. The declaration stated, that one *W. Preeb* was seized in his demesne as of fee of a certain piece of land with the appurtenances, situate in the hamlet of *Coundon*, in that part of the parish of *Holy Trinity* which lies in the county of *Warwick*; and that he and all those whose estate he hath in the said piece of land, &c. from time immemorial have had and used, and been accustomed to have and use, and of right ought to

A claim of a prescriptive right of way from *A.* over the defendant's close unto *D.* is not supported by proof that a close called *C.*, over which the way once lay, and which adjoins to *D.* was formerly possessed by the owner of close *A.*, and was by him conveyed in fee to another,

without reserving the right of way; for thereby it appears that the prescriptive right of way does not, as claimed, extend unto *D.*, but stops short at *C.*—(Qu. if the claim had been for a prescriptive right of way over the defendant's close towards *D.*

have

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have had and used, &c. for themselves and their tenants occupiers of the said piece of land, a certain way from the said piece of land into, through, and over a certain other piece of land of the defendant, situate in the said hamlet, &c. unto the village of *Allestey* in the said county, and so from thence back again through and over the said piece of land of the defendant unto the said first-mentioned piece of land to pass and repass with carriages, &c. at all times, &c. That *Preeb* demised the said first mentioned piece of land to the plaintiff to hold, &c. by virtue whereof he entered and was possessed; and the defendant wrongfully obstructed the said way, &c. Plea, the general issue. The cause came on to be tried before *Chambre B.* at the last Spring Assizes for the county of *Warwick*, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

In *December 1783* *Preeb* became seised in fee of *Wheeler's Close*, (being the plaintiff's land mentioned to be situate in the hamlet of *Coundon*, &c.) and also of another piece of land called *Pool Meadow*, situate in *Allestey* aforesaid. *Preeb* being so seised, in *February 1786*, by indentures of lease and release granted and conveyed *Pool Meadow* to one *T. Bree* of *Allestey* aforesaid in fee, without reserving any way whatever over the said piece of land, by virtue whereof *Bree* became and still is seised thereof as aforesaid. In *December 1786* *Preeb* demised *Wheeler's Close* to the plaintiff for 21 years, by virtue whereof the plaintiff entered, and is now in possession. The way claimed by the plaintiff was from *Wheeler's Close* over a piece of land belonging to the defendant called *Lower Benton's Close*, from thence over another piece of

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land

land belonging also to the defendant called *Barn Meadow*, from thence over the piece of land belonging to *Bree* called *Pool Meadow*, and from thence into *Allefley* aforesaid, and so from thence back again. The way claimed is not a way of necessity, the plaintiff having other ways as well to *Allefley*, (which are more circuitous and not so convenient) as to *Coventry*, (which is the other part of the parish of *Holy Trinity*); and the plaintiff had no licence from *Bree* to pass or re-pass over his close called *Pool Meadow*. The plaintiff proved an obstruction by the defendant erecting a gate across the way in his own close. It was objected on the part of the defendant, that whatever might be the effect of the evidence to prove an immemorial right anterior to *Press*'s seisin of the plaintiff's close and *Pool Meadow*, and his conveyance of the latter close; yet that the plaintiff had not supported his declaration, for that by such seisin as aforesaid, and the conveyance of *Pool Meadow* in fee in 1736, without reserving the way, the right of way over the defendant's close was extinguished, or at least suspended, and that the locking up of the gate, as alleged in the declaration, was no injury to the plaintiff. It was therefore agreed to reserve the question of law for the opinion of the Court; and the cause was left to the jury upon the evidence of usage, who found for the plaintiff, subject to the opinion of this Court, whether under the circumstances the plaintiff was entitled to recover.

Reader for the plaintiff. The question is, whether the conveyance of *Pool Meadow* to *Bree* by the owner of *Wheeler's Close* without reserving the right of way, extinguished the right of way over the defendant's close. None of the cases of extinguishment of rights of way by unity of possession apply to the present; they were all
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cases where there was a unity of possession of the close over which the easement was claimed with the close in respect of which it was claimed: but this is an attempt by the defendant to extinguish the right of way over his own close, by shewing an extinction of it over another intermediate close; that however cannot destroy the prescription over the defendant's close, although it may lay the plaintiff under difficulties with respect to other persons in the enjoyment of the whole extension of such way. [Grose J. observed, that this was claimed in the declaration as one entire prescriptive right of way from one of the termini to the other; and as the conveyance of part of the land over which the way led by the owner of the close in respect of which it was claimed, without reserving the way, extinguished the prescription at least as to that part, it consequently extinguished the prescriptive right as claimed in the declaration.] That might have been so, if the whole way over each close between the termini had been stated in the declaration; but that is not so, nor was it necessary so to state it, according to *Rouse v. Bardin* (a): it is enough to shew that the party had a prescriptive right of way over the defendant's close in going from one of the termini to the other: for the prescription so generally claimed shall only be taken to apply to the defendant's land. Thus in *Sloman v. West* (a), Dodderidge J. puts this case; "if a man have a right of way from his house to the church, and the close next to his house over which the way leads is his own, he cannot prescribe that he has a right of way from his house to the church, because he cannot prescribe for a right of way over his own land:" But *Ley C. J.* and *Chamberlaine J.* contrà, for then all ways over common

(a) 1 H. Blac. 351.

(b) Palm. 387. 2 Roll. R. 397.

fields would be destroyed; and they said, that a general prescription applied only to the lands of others. *Dodderidge* J. observed, that it might be otherwise where the way was indefinite. Again, in *Jackson v. Shillito, Tr.* 32 G. 3. C. B. to trespass qu. cl. fr. the defendant in his plea prescribed for an occupation way *from* his own close "unto, through, and over" the said several closes in which, &c. "*to and unto* a certain highway," &c. and from thence back again unto the said close of the defendant. At the trial before Lord *Kenyon* at *York* Summer Assizes 1792, it appeared that one out of several intervening closes was in the possession of the defendant himself; which his lordship thought negatived the prescriptive right claimed, and the plaintiff recovered a verdict: but on application to the Court of C. B. a new trial was granted, on which the defendant afterwards obtained a verdict.

Geaff contrà was stopped by the Court.

LORD KENYON C. J. The difficulty which the plaintiff lies under here is, that he has stated a prescriptive right of way from his own close over the defendant's land *unto* the village of *Allefley*, which is disproved by the conveyance of *Pool Meadow* from the owner of *Wheeler's Close*, without reserving a right of way, which therefore operated as an extinguishment, or at least as a suspension of the right as claimed. The plaintiff may perhaps still have a prescriptive right of way over the defendant's close *towards*, but certainly not *unto Allefley*. I have been considering whether if the right had been so stated it might not have been supported. For any easement may be claimed by prescription in the same manner as it might have been holden by grant. Now if there were several

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closes belonging to different owners lying between the two termini, a grant of a right of way over each might have been obtained from the several owners at different times. But the manner in which the prescription is here pleaded precludes any assistance from that consideration, supposing it to be well founded. And in this respect the case differs very materially from that of *Jackson v. Shillito*; for there the defendant had in fact a right to go the whole line of way from the one terminus to the other; whereas here the plaintiff has no such right, for his prescriptive way stops short of *Allestey unto* which it is claimed in the declaration. This is also much strengthened by the opinion of Mr. Justice *Dodderidge* in the case referred, who is a host in himself; and the two other judges who differed from him do not seem to have given a sufficient answer to what he said.

GROSE J. assented for the reason he had before given.

LAWRENCE J. The plaintiff claims a prescriptive right of way from his close over the defendant's unto *Allestey*. Now that is not proved by shewing a prescriptive right of way over the defendant's or any other intermediate close, which stops short of the place to which the claim stated extends.

LE BLANC J. In the case of *Jackson v. Shillito* the defendant had a right to proceed to the terminus ad quem over the way claimed. But here the plaintiff had no right of way further than *Pool Meadows*, which adjoins the terminus ad quem.

Postea to the Defendant.

1801.

HAMILTON *against* WILSON and Others.Tuesday,
May 5th.

THIS was an action brought by the plaintiff as sheriff of Cumberland on a bond of indemnity in the penal sum of 3500*l.* given to him by the defendant *Wilson*, as gaoler of the county gaol, and by the other two defendants as his sureties. The plea cravedoyer of the bond, (which was in the usual form,) and of the condition, which recited, that whereas the plaintiff was appointed sheriff of Cumberland, and had appointed the defendant *Wilson* to be gaoler of the county gaol, and of all such prisoners as were then in the gaol, or should be delivered to the plaintiff by the late sheriff, *or should or might be arrested, attached, or imprisoned in the said gaol by virtue of any manner of writ, warrant, or other process or authority whatsoever directed or made to the plaintiff or his under-sheriff or bailiffs, &c. appointed for that purpose, &c.* to hold and exercise the said office of keeper of the said gaol, &c. during the shrievalty of the plaintiff, &c.; and then stated the condition to be, that if the defendant, his deputies, &c. should during the continuance of the plaintiff as sheriff, &c. *receive and safely keep in custody according to the tenor, purport, and effect of the writs, warrants, precepts, commandments, or authorities, by virtue of which any prisoner may or shall be or stand committed, charged, or imprisoned in the said gaol, or in the custody of the defendant as gaoler, &c. or of the plaintiff as sheriff, &c.* as well all prisoners then in the said gaol, &c. as also every prisoner who should be committed, sent, or delivered to the defendant, &c. upon or by virtue of *any writ, warrant, precept, process, commandment, or authority whatsoever* of, by, or from the plaintiff or his under-sheriff, deputies, &c., or from or by any justice of the

After a party arrested on civil process has been discharged on giving a bail-bond to the sheriff for his appearance at the return of the writ, it is optional in the sheriff whether he will accept the surrender of the party in discharge of the bail-bond before the return of the writ: and therefore though notice of such surrender were given to the sheriff and the gaoler in whose custody the party then was at the suit of another; after which the gaoler let the party out of custody; yet held that the gaoler was not liable upon his bond of indemnity to the sheriff as for an escape in the former suit; for the party was not legally in the custody of the sheriff or his gaoler merely by virtue of such notice of surrender.

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peace, &c., or by any other person having lawful authority so to do, *until all and every of the said prisoners should be delivered by due course of law, or set free with the allowance in writing of the plaintiff or his under-sheriff, or delivered over to the next sheriff, &c.; and also if the defendant, his deputies, &c. should not nor did discharge out of custody any prisoner which was or should be taken, committed, delivered, or left in the said gaol, in the custody of him the defendant, his deputies, &c., unless by due course of law, without the special warrant in writing under the hand and seal of the plaintiff or his under-sheriff, or the liberate in writing of all the plaintiffs or other proper parties at whose suit such prisoner should be detained, &c.* first had and obtained for that purpose; and also if the said gaoler, &c. should undertake the charge of such gaol, and be chargeable with the prisoners therein, and for all escapes of prisoners out of the said gaol, or from or out of the custody of the gaoler, &c., and with all things belonging to the charge and duty of a gaoler, &c.; and also if the defendants should indemnify and save harmless the plaintiff and his under-sheriff, &c. from every other person touching and concerning the premises, and from all manner of escapes of all manner of prisoners *after they should be legally committed and delivered into the custody of the defendant, or into the said gaol, or left under the care, custody, or charge of any of his deputies, &c., or out of the custody of the plaintiff as sheriff, &c.; and of, from, and against all actions, &c. judgments, expences, losses, and incumbrances whatsoever imposed or levied upon or against the plaintiff, &c. by reason of any escape, or letting any prisoner voluntarily, or negligently, or otherwise go at large, &c. by reason of any act, default, neglect, misfeasance, commission, or omission, &c. or from or by reason of any matter, cause, or thing that should or*
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might be done by the defendant as gaoler, &c., then the obligation to be void, otherwise, &c. The plea then averred performance. The replication stated, that on the 12th of June, 39 Geo. 3. one *Richardson* was indebted to *Taylor* and *E. Dixon* in 38 l., and continued so indebted until the payment of that sum by the plaintiff as aftermentioned; that *Taylor* and *Dixon*, for the recovery of the said debt, on the same day and year sued out a writ against *Richardson*, directed to the sheriff of *Cumberland*, returnable *Wednesday* next after the *Morrow of All Souls*, indorsed for bail for 38 l., and delivered the same to the plaintiff, being sheriff, &c., who thereupon arrested *Richardson*: That *Richardson* with his bail, *Dodd* and *Fetherston*, then gave a bail-bond to the sheriff, conditioned for the appearance of *Richardson* at the return of the writ, and was thereupon discharged on such bail. That afterwards the plaintiff, before the return of the same writ, again arrested *Richardson* by virtue of another writ, and carried him to gaol, and there delivered and committed him to the defendant *Wilson* as gaoler, whereby *Richardson* became and was in the lawful custody of the plaintiff as sheriff, and of the defendant *Wilson* as gaoler. That *Richardson* so being in such custody, and *Dodd* and *Fetherston* so being his bail, they afterwards and before the return of the first-mentioned writ, for the purpose of rendering *Richardson* to the custody of the plaintiff as sheriff, in discharge of his said bail, and of satisfying the said bail-bond, made a notice in writing, and directed the same to the plaintiff as sheriff, and to his under-sheriff, and delivered the same to the plaintiff being sheriff, &c. and to the defendant *Wilson* being such gaoler, and thereby required the plaintiff to take notice, that *Richardson* being then a prisoner in the plaintiff's custody, was thereby rendered, and did render

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himself in discharge of his said bail in the said action, wherein *Taylor* and *Dixon* were plaintiffs and *Richardson* was defendant; and the present plaintiff was thereby required to detain and consider *Richardson* in custody in the said action accordingly, and to deliver up to be cancelled the bail-bond so given as aforesaid; whereby *Richardson*, so being in the custody of the plaintiff and of the defendant as gaoler aforesaid, became and was rendered in the same action to the custody of the present plaintiff as sheriff, and of the defendant *Wilson* as gaoler, in discharge of his bail; and his bail were thereby discharged, and the bail-bond satisfied: and thereupon it became the duty of the defendant *Wilson*, as gaoler, to detain *Richardson* in his custody according to the exigency of the first-mentioned writ, whereof he had notice; but that he afterwards, without the knowledge or consent of *Taylor* and *Dixon* the plaintiffs in that action, or of the present plaintiff, and without any warrant, authority, or allowance whatsoever, voluntarily permitted *Richardson* to escape, the debt due from him to *Taylor* and *Dixon* being then unsatisfied. That *Richardson* did not appear in court according to the exigency of the first writ, and that such proceedings were afterwards had in the same court, &c. that the plaintiff, by reason of the defendant *Wilson's* breach of duty as gaoler, was obliged to pay, and did pay to *Taylor* and *Dixon* their debt of 38 *l.*, and also 20 *l.* for their costs, &c. To this there was a general demurrer and joinder.

Gibbs in support of the demurrer. The defendant only became bound for the safe keeping of such prisoners as should be in his custody by the authority of the sheriff; but that was not the situation of *Richardson* under the circumstances

cumstances stated in the replication. The only way in which a gaoler is bound to take notice of any person being committed to his custody by the authority of the sheriff under civil process is by the sheriff's warrant to him for that purpose. After the sheriff has arrested a party by virtue of the writ delivered to him, he makes out his warrant to the gaoler to receive and keep him in his custody, which is the only notice the gaoler has of such arrest. Now here the defendant had no such notice of the arrest of *Richardson* under the first writ; for before his commitment to gaol the sheriff himself discharged him upon a bail-bond, whereby the bail undertook for his appearance at the return of the writ. From that time *Richardson* ceased to be in the custody of the sheriff. And though it has been holden, that if a party out upon a bail-bond surrender himself to the sheriff before the return of the writ, the sheriff may accept his body and cancel the bail-bond (a), yet certainly it is at his option to accept or refuse such surrender; for otherwise a sheriff would be in a perilous condition, if every person discharged on a bail-bond may surrender himself in discharge of his bail whenever he pleases. The sheriff does not carry his prison about with him, and may not be prepared to accept the party at the time. Besides, the condition of the bail-bond is, that the bail should render the defendant at the return of the writ, which is done in this court; and according to the case of *Harrison v. Davies* (b), they cannot discharge their obligation to the sheriff by a render of the body, or in any other manner than by putting in good bail above. The sheriff therefore, though liable to the plaintiff in the

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(a) Vide *Jones v. Lander*, 6 Term Rep. 753. *Stamper v. Milbourne*, 7 Term Rep. 122. and *Hyde v. Whiscard*, 8 Term Rep. 456.

(b) 5 Burr. 2683.

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action for the appearance of the defendant at the proper time and place may, as between himself and the bail below, insist upon the condition of the bail-bond, and is not obliged to incur the risk, expence, and trouble of re-taking and keeping the defendant in the action. The case cited shews however, that when a party is discharged out of custody on a bail-bond, he is not considered as virtually continuing in the sheriff's custody. Nothing then appears to shew, that at the time when the defendant discharged *Richardson* out of his custody in the second action, he had any notice that *Richardson* was in the sheriff's custody under any other process; nor was he in such custody, unless the sheriff had consented to receive him again. Therefore the defendant having no authority to detain the party is not liable in this action as for an escape.

Holroyd contra. The defendant undertook not to discharge out of custody any prisoner "without the special
" warrant in writing under the hand and seal of the sheriff
" or his under-sheriff, or the liberate in writing of all the
" plaintiffs at whose suit such prisoner should be de-
" tained;" notwithstanding which he set *Richardson* at liberty, who was in his custody, without any such authority; which is all that is necessary to shew in order to entitle the plaintiff to recover upon the bond. It is not denied that the sheriff might receive the surrender of *Richardson* in discharge of his bail before the return of the writ, and nothing being stated here to shew his dissent to the notice served on him for that purpose, it must be taken that he assented, if that be necessary. From that time *R.* was legally in the custody of the sheriff at the suit of the plaintiff in the first writ, and the defendant as gaoler might

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might legally detain him, and it was his duty so to do, and his not having so done subjects the sheriff to a responsibility which he would not otherwise have incurred; for at all events he is liable to the plaintiff in that action. And even if the bail-bond continued in force notwithstanding the surrender, the sheriff will be put to the trouble and risk of pursuing his remedy against the bail; but if the bail-bond be discharged, he will be left without remedy by the act of the gaoler. What was said in *Harrison v. Davies* (a), that nothing is a discharge of the bail-bond to the sheriff but putting in bail above, has been much shaken by *Jones v. Lander* (b) and the other cases before alluded to, and was so considered to be in a subsequent case of *Maddocks v. Bulcock* (c), where the Court held, that the surrender of the defendant before the return of the writ was a performance of the condition of the bail-bond; and therefore though the plaintiff had taken an assignment of the bail-bond after a surrender, but before the return of the writ, the Court stayed the proceedings against the bail: but as it was taken without notice of such surrender, the plaintiff had the costs of the proceeding up to that time. It seems therefore as if it had been there considered as compulsory on the sheriff to receive the surrender of the defendant before the return of the writ in discharge of the bail-bond. At any rate however, if the sheriff have an option in such a matter, the defendant had no right to decide for him; but at the time of *Richardson's* discharge in the second action was bound to apply to the sheriff to know if there were any other detainers against him. And here it is alleged, that after notice of the render to the sheriff, (which notice also ap-

(a) 5 Burr. 2683.

(b) 6 Term Rep. 753.

(c) 1 Bos. & Pull. 325.

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pears to have been given to the defendant,) *is become the duty of the defendant to detain Richardson in his custody, according to the exigency of the first writ, whereof the defendant had notice*: and this is admitted by the demurrer. It is not therefore competent to the defendant to argue that he was without notice of the prior proceedings, or that *Richardson* was not detained in custody by the sheriff's authority in the first action.

Lord KENYON C. J. After a defendant has been discharged out of custody upon a bail-bond, it is neither in the power of the bail to render him nor of the party to surrender himself again into the custody of the sheriff before the return of the writ, without the consent of the latter. Bail above are indeed said to be the legal gaolers of the defendant, and may take and render him at any time: but this is not the case with respect to bail to the sheriff: their undertaking is, that the party shall appear at the return of the writ; which according to the case of *Harrison v. Davies* can only be satisfied by their putting in good bail above. That case I consider as having decided the point, which has never since been controverted. For the case of *Jones v. Lander* and the others which followed it only went the length of giving an option to the sheriff, if he pleased, to accept the surrender of the party, who was willing to return into his custody before the return of the writ: but the sheriff may refuse so to do, and may rest upon the security of the bail-bond, and insist upon the bail performing the condition of it. Now here it is not stated that the sheriff did assent to the surrender of the party, without which the latter was not in his custody under the first writ; and consequently the gaoler cannot now be liable upon his bond of indemnity

to the sheriff, for having permitted the prisoner to go at large, having no authority to detain him in custody at the time.

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Holroyd then asked leave to amend, which, (it being after argument upon the demurrer,) was denied. And

Per Curiam,

Judgment for the Defendant.

LEGH *against* LEWIS.

Tuesday,
May 5th.

DEBT on bond for the penalty of 400*l*. The plea craved oyer of the bond and the condition, which latter was as follows: Whereas the ancient public school within the township of *Nether Knutsford* in the county of *Chester* is lately become vacant by the death of *J. F.* the late schoolmaster thereof, and whereas it belongeth to the plaintiff to appoint a schoolmaster thereto, and whereas the plaintiff hath this day appointed the defendant unto the said school; and whereas previous to the executing the said appointment the defendant agreed absolutely to resign the said school, &c. and all his interest therein unto the plaintiff, his heirs, &c. when he the defendant shall be required by the plaintiff, his heirs, &c. by writing under his or their hand so to do: now the condition of the above-written obligation is such, that in case the defendant shall at the request of the plaintiff, his heirs, &c., such request being made under his or their hands, absolutely resign unto the plaintiff, his heirs, &c. when he the defendant shall be required by the said plaintiff, his heirs, &c. so to do, as well the said school, &c. as also all his the defendant's estate, &c. in the same, then the above-

A bond given by a schoolmaster of an ancient public school, who had a freehold in his office, to resign at the request of his patron, is good at law; but equity will restrain any improper use of it by the patron.

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above-written obligation to be void, otherwise to remain, &c. The defendant then pleaded *actio non*, &c., because the said office of schoolmaster of the said ancient public school at, &c. is an office trust and profit, and a freehold office; and that every person thereto appointed hath always hitherto, from the time of such appointment, been and continued and remained after such appointment seised thereof as of freehold and right for the term of the life of the person so appointed thereto, without any condition whatsoever to resign the said office; and that it was the duty of the plaintiff to have made an appointment to the said office without making any such stipulation or condition as in the said condition of the said writing obligatory is mentioned; and that the defendant heretofore on, &c. at, &c. was appointed by the plaintiff, to whom it belonged to appoint, &c., to be the schoolmaster of the said ancient public school, &c., and became, and was, and still is seised of the said office as of freehold and of right, for the term of his natural life. And that before the execution of the said writing obligatory, and before the said appointment, it was corruptly and unlawfully agreed between the plaintiff and defendant, and contrary to the duty of the plaintiff in that behalf, that the plaintiff would appoint the defendant to be schoolmaster, &c. in consideration that if the defendant were so appointed he would resign the said school, &c. unto the plaintiff, his heirs, &c. when he the defendant should be required, &c. by writing, &c. And that the defendant, in pursuance of the said unlawful and corrupt agreement, afterwards, to wit, on, &c. at, &c. did seal and deliver the said writing obligatory, &c. with the condition above specified: and so the defendant saith, that the said supposed writing obligatory so made and given by him for the cause aforesaid

said

said is void in law; and this he is ready to verify: wherefore, &c. To this there was a demurrer shewing for special causes, that the plea is too vague and general, and does not shew with certainty and precision how or for what reason it was the duty of the plaintiff to have appointed to the said office of schoolmaster without making any such stipulation or condition as in the said condition of the bond is contained, nor how or for what reason the said agreement in the condition mentioned was corrupt or unlawful or contrary to the duty of the plaintiff: and for that it is not expressly alleged in the said plea that the said school was a public school, or the supposed office of schoolmaster a public office; or that the same school has existed immemorially; or when and how and on what terms and conditions the same was founded; and for that the inference drawn in the said plea, that the said writing obligatory is void in law, is not warranted by the premises; and for that the same plea contains no material or traversable averment, but is argumentative, &c. Joinder in demurrer.

Giles was to have argued in support of the demurrer: But

Manley contra was desired to begin by stating the particular grounds of objection to the condition of the bond. He insisted that enough was stated in the plea to shew that the office in question was an ancient public office and a freehold: and though it did not expressly appear by what authority the plaintiff exercised his right of appointment to the office, yet it was alleged that the persons holding it had always been appointed for life, without any condition

of

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of resignation as had been here imposed upon the defendant. That by the general rule of law persons appointed to freehold offices, which were public trusts, were not removable therefrom except for misconduct, nonuser, or incompetency, neither of which were imputed in this case; and therefore though a bond to resign on either of those accounts might have been good, because made in aid of the law, as in *Bagshaw v. Bofsley* (a), a bond to enforce residence on a living, and against waste; yet a general bond conditioned to resign at the will of the patron was repugnant to the very nature of such an office or trust, and exceeded the power of appointment stated in the plea and admitted by the demurrer to belong to the plaintiff. Such powers have always been construed strictly; and the patron cannot clog his appointment with any new conditions not warranted by the will of the founder. After the plaintiff had appointed the defendant he was *functus officio* during the defendant's life, or until he was lawfully removed; an attempt therefore to reserve any other control over the appointee was in contravention of the law of patronage, and avoided the instrument taken to secure such an illegal purpose. That the practice of taking such bonds, if allowed, would open a door to corruption, and be a cover for the sale of the office by the patron, which was clearly illegal in the case of any public trust. In *Laying v. Paine* (b) it was holden, that a bond given by one of the officers mentioned in the stat. 5 & 6 Ed. 6. c. 16. to surrender his office at the pleasure of the person appointing, was void. It was true, that it was avoided in that case by the particular

(a) 4 Term Rep. 78.

(b) *Willia's Rep.* 571, 4.

statute in question, as touching the administration of justice: but Lord C. J. *Willer*, in his reasoning on the case, enters into general grounds, which shew the illegality of such conditions as applicable to all offices of trust.

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Lord KENYON C. J. I cannot see any thing illegal or wrong in the patron of this school taking a general bond of resignation from the schoolmaster whom he appoints. Many good reasons may occur for taking such a security; it enforces his good behaviour, and may tend to prevent those ill consequences which too frequently happen from the neglect of those whose duty it is to superintend such institutions. What is this but a more easy method of exercising a visitatorial authority? Such an authority must exist somewhere. If the plaintiff's ancestor founded the school, and no particular visitor were appointed, the authority descends to him as heir. Suppose the plaintiff himself had been the founder, what could have prevented him from taking such a bond? If indeed the defendant could have shewn that any corrupt use were intended to be made of such a bond, he would lay the axe to the root: the Attorney-General would ex officio interfere, and upon application to the Court of Chancery the appointment would be taken out of the hands of him who so exercised it corruptly. The case of *Laying v. Paine* turned altogether upon the statute of *Ed. 6.* which applies only to the sale of offices of a public nature under the crown, and certainly not to an office of this description. But I never can admit that at common law a general resignation bond of an office is illegal, although the party may have a freehold in the office. In the instance of ecclesiastical livings that is universally the case:

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every rector has a freehold in his rectory; yet it was never doubted but that resignation bonds for certain purposes and up to a certain extent at least were binding; though they put an end to the freehold. This was fully decided in *Grey v. Hesketh* (b) by Lord Hardwicke; saying at the same time, that if an ill use were attempted to be made of them the Court of Chancery would interfere (a). Here nothing of that sort is attempted to be shewn. Nor indeed does it distinctly appear upon the plea what the nature of this office is, how constituted, or whether the appointment must necessarily be for life without any condition annexed. At present I see no grounds for deciding that the condition of the bond is necessarily illegal.

GROSE J. was of the same opinion.

LAWRENCE J. I own I have considerable doubts upon the question. The plea is rather loosely drawn, and it might have stated with more precision the nature and extent of the foundation and the power of appointment; it does however state, that the office of schoolmaster is an office of trust and profit, and a freehold; that every person appointed thereto has always continued for life without any condition to resign; and that it was the duty of the plaintiff to have appointed to the office without any such stipulation. If then we are to collect from thence that the founder intended that the appointment should be no otherwise than for life, it seems to me very doubtful how far the person who has the power of such ap-

(a) *Ambl.* 268. 3 *Burn's Ecc. L.* 332. S. C. in *B. R.*

(b) As in *Durston v. Sandys*, 1 *Vern.* 411.

pointment can exercise it in a different manner from what the founder intended. It is true that a bond may be taken to enforce the observance of those duties which by law are required to be performed by the appointee of an office; but then it should be so expressed in the condition. But a general bond like the present, though it may be made use of for good, may also be made use of for bad purposes; at least there is nothing on the face of the instrument to restrain the improper use of it, as there is where it is conditioned for the due performance and execution of the office. And as Lord Ch. J. *Willes* observed in the case referred to, such a general bond of resignation may be used as a mean of selling the office, or to favour the partial views of the patron by compelling the appointee to regulate his conduct, not by the duties of his office, but in subservience to the pleasure of his patron. The same argument was urged in favour of general resignation bonds in the case of livings, namely, that they were the means of enforcing good behaviour: but in the case of *The Bishop of London v. Fytche* (b), Mr. Justice *Buller* observed on the inconclusiveness of that argument, by saying that it might with equal force be argued that it might be made use of for bad purposes: It is true that a great majority of the judges were of opinion that such general resignation bonds were valid; but they grounded themselves upon a train of positive authorities in support of them, and not upon the reason of the thing: and it must be admitted that if it were a new question at this day it would be very difficult to say upon principle that such bonds could be legal.

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(b) I have been enabled to add a note of this case in *B. R.*, quod vide post.

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LE BLANC J. After the determinations which have taken place with respect to general resignation bonds of livings, I cannot say that this bond is not good in point of law. It is true those determinations were impeached in the case of *The Bishop of London v. Fytche* in the House of Lords; but the decision in that case against the validity of such bonds turned ultimately upon the ground of their being simoniacal and against the statute, and not as being contrary to the general principles of the common law. That does not affect the present action upon such a bond relating to the office of a schoolmaster; and therefore it falls within the principle of the former determinations, that such general resignation bonds are good at law. And after such a current of authorities I do not feel myself at liberty to canvass the grounds of that opinion.

Judgment for the Plaintiff.

Twifday,
May 5th.

WILLEY *against* CAWTHORNE.

A memorial under the annuity act of a bond, stating that *A.* and *B.* severally became bound, is not sufficient in law if the bond be joint as well as several.

DEBT on bond in the penal sum of 150*l.* Plea, 1st, craving oyer of the bond, (which was a joint and several bond from one *G. H.* and the defendant,) and of the condition of the bond, which (reciting that the plaintiff had agreed with *G. H.* for the purchase of an annuity of 12*l.* payable quarterly to him the plaintiff during the lives of *G. H.* and the defendant, and the survivor of them, for 72*l.* which was then paid to *G. H.*, and that for better securing the annuity *G. H.* and the defendant had agreed to execute a warrant of attorney of the same date as the bond to confess judgment, &c.) was for securing the payment of the said annuity upon certain days therein mentioned. Pleaded, 1st, Non est factum. 2dly, That

within twenty-one days after the execution of the supposed writing obligatory, a memorial of the same and of the granting of the annuity was pursuant to the statute inrolled in the Court of Chancery; which memorial was of a bond dated, &c. *under the hands and seals of G. H. and the defendant*, whereby they severally stand bound, &c. in 150*l.*, reciting that the plaintiff had agreed with G. H. for the purchase of an annuity of 12*l.* for 72*l.*, which G. H. thereby acknowledged to have received, conditioned for payment of the said annuity at the times therein mentioned, and witnessed by D. B. and J. M., &c. dated, &c. prout patet, &c.; which said memorial is not a good and sufficient memorial of the said writing obligatory, and of the granting of the said annuity, and the considerations of granting the same, &c.; by reason whereof the said supposed writing obligatory is void in law, &c. 3dly, That before the making of the said writing obligatory, G. H. and the defendant, for the better securing of the said annuity, agreed to execute a warrant of attorney to confess judgment, dated, &c., *which said agreement was and is an assurance for the due payment of the said annuity, &c.*, and that no memorial of the said last-mentioned assurance was within 20 days of the execution thereof inrolled, &c. according to the form of the statute, &c. There was a general demurrer to the second plea and joinder: and replication to the last plea, that no warrant of attorney was ever executed by G. H. and the defendant, or either of them, for the better securing the said annuity; nor was any agreement for the execution of any such warrant of attorney ever in fact made, signed, or reduced into writing, or otherwise than in and by the said recital in the condition of the bond before-mentioned; and that the said recital was introduced in the said condition

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by mistake in preparing the same. And this, &c. To this there was also a demurrer, and joinder.

Several points arose in this case, which were argued at length by *Murray* in support of the demurrer, and *Wigley* contra; but the only one upon which the Court gave any opinion was an objection, which went to the action, of a variance between the bond on which the plaintiff declared, which was a *joint and several* bond given to secure an annuity, and the memorial of such bond registered under the annuity act (17 Geo. 3. c. 26.), which was of a *several* bond only.

LORD KENYON C. J. The objection is decisive. The object of the legislature was to hold the annuitant to a strict description in the memorial of the consideration of the annuity. The nature of the several instruments by which it is secured must be accurately set forth. That has not been done in the present case; for though *each* of the obligees as described in the memorial are bound to the plaintiff, yet the obligation is of a different nature from that described, namely, *joint* as well as *several*. And the difference between a joint and several bond is in some respects important; in the former case, if one of the obligees die, his executors are discharged from any liability to the obligor, whose only remedy is against the survivor; in the latter case it is otherwise. Therefore the memorial does not truly describe the security as to the extent of it.

LAWRENCE J. The object of requiring a memorial of the securities was to shew the real situation of the parties, and the nature of the remedies which the grantee had for the payment of the annuity. Now the memorial here is defective,

defective, in not shewing in what manner the obligors might be sued; it only shews that they may be sued severally; whereas by the nature of the obligation they are liable to be sued *jointly* as well as *severally*.

The other Judges assented.

Judgment for the Defendant.

LEE *against* LINGARD.

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Wednesday,
May 6th.

AT the trial of this cause at the Sittings after last *Trinity* term at *Guildhall* a verdict for the plaintiff for 1200 *l.* damages, and costs 40*s.* was taken by consent, subject to the award of an arbitrator (it being a question of figures), who was to make his award on or before the second day of *Michaelmas* term then next, and the costs to abide the event. And this was afterwards made a rule of court. On the 25th of *August* last the arbitrator made his award, whereby he directed the defendant on the 12th of *November* following to pay the plaintiff 1071 *l.* 16*s.* 1*d.* The defendant not attending as required to settle the demand, the plaintiff proceeded to tax his costs before the Master at 149 *l.*, and signed final judgment on that day for the said sum of 1200 *l.* for which the verdict was first taken, 40 *s.* for costs, and 147 *l.* increased costs, making together 1349 *l.*; and on the 17th of *November* executed a writ of *fi. fa.* indorsed to levy 1224 *l.* 3*s.*, besides officers' fees, sheriff's poundage, and other expences; which sum of 1224 *l.* 3*s.* consisted of the following items; " amount " of debt upon the award 1071 *l.* 16*s.* 1*d.*; interest " thereon from the 12th to the 25th of *November* 1 *l.* 18*s.*; " costs taxed 149 *l.*; *fi. fa.* 16*s.* 6*d.*; test. *fi. fa.* 11*s.* 6*d.*;

Where a verdict is taken pro forma at the trial for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded is to be taken as if it had been originally found by the jury; and the plaintiff is entitled to enter up judgment for the amount, without first applying to the Court for leave so to do.

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"warrant and messenger 3 s. 6 d.; letters to the under-sheriff, and postage 3 s. 6 d." In addition to these sums, the sheriff returned that he had levied 33 l. 2 s. for his poundage. Thereupon the defendant obtained a rule, calling on the plaintiff to shew cause why the writ of fieri facias executed in this cause should not be set aside with costs, and the money levied and poundage thereon be returned to the defendant.

This rule was principally grounded upon a supposed irregularity in the plaintiff in having, without leave of the Court first obtained, entered up final judgment, and sued out execution for the sum awarded. In support of which it was contended to be the usual practice (a) where a verdict was taken by consent, subject to the future award of an arbitrator, that when the sum really due was ascertained by the award, to move the Court for leave to enter the verdict for so much as the arbitrator had awarded, and afterwards to proceed to final judgment and execution. On the other hand it was insisted, that the plaintiff was at liberty to enter up judgment for the sum awarded without first applying to the Court; more especially when, as in this case, the sum awarded was less than that for which the verdict was entered. This was the principal point contested: but it was also contended on the part of the defendant, that the execution was at all events excessive, inasmuch as the defendant was not chargeable with interest on the sum awarded, nor with the sheriff's poundage, nor with the other fees on the levy.

The Attorney-General in support of the rule.

(a) Vide 2 Salk. 84. and Qto. Barnes, 58. cited in 2 Tidd's Prac. 750. with a quare.

Erskine and Garrow contra.

1801.

*Let
again
LINGARD*

LORD KENYON C. J. There is no foundation for the additional charge for interest on the sum awarded. Wherever interest is intended to be given, it forms part of the damages assessed by the jury, or by those who are substituted in their place by the parties. Also the items for sheriff's poundage and the other fees of the levy must be struck out of the account: the defendant is not liable for any such charges. With respect to the principal question, I do not find, upon reference to the Master, that there is any such settled practice as that which has been supposed, requiring a plaintiff, for whom a sum has been awarded under such a rule of reference as the present, to apply first for the leave of the Court before he can enter up his judgment for the sum so awarded. Upon principle it appears to me not to be necessary. It is often a matter of convenience, and in furtherance of justice at nisi prius, where matters of account between parties are to be investigated, to refer the amount to be settled by an arbitrator, who may have more time and opportunity to make the inquiry and arrive at a proper conclusion than the jury are able to do; a verdict is therefore taken *pro forma*, subject to the award of the arbitrator; but after the arbitrator has ascertained the sum to be recovered, such finding is in the place of the verdict, and must be considered the same as if the jury had originally found so much to be due: and then all the same consequences ensue. The plaintiff is only entitled to enter up his judgment for so much; and the sum for which the verdict was nominally taken cannot be considered as in the nature of a penalty for which the plaintiff is entitled to enter up judgment. If the jury had in the first instance given their verdict for the sum

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1807.

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awarded, the plaintiff would have been entitled to enter up his judgment after the four first days of the ensuing term, and then he would have been entitled to sue out execution immediately afterwards. A pause is allowed for those four days to the party against whom the verdict is given, in order to afford him an opportunity of applying to the court to rectify any mistake which may have been committed. Here the defendant has had the benefit of a longer delay, for final judgment was not entered till the 14th of *November*. The award was in the place of the verdict of the jury; and as there is no rule of practice obliging the party to apply to the Court for leave to enter up judgment for the sum awarded, I see no reason for making such a rule now. Therefore, subject to the deductions which have been mentioned, let the execution stand: but inasmuch as there has been an excess in levying more than the defendant was bound to pay, and to remedy which he was compelled to apply to the Court, I think he is entitled to be allowed the costs of this application.

Per Curiam, Deducting the charge of interest, and the sheriff's poundage, and the costs of the levy, to be returned to the defendant; and on payment of the costs of this application by the plaintiff to the defendant; the remainder of the money levied to be paid over by the sheriff to the plaintiff.

1801.

PEARSON *against* RAWLINGS.Wednesday,
May 6th.

A Rule was obtained, calling upon the plaintiff to shew cause why the defendant should not be discharged out of the custody of the marshal, on the ground of his not having been charged in execution in due time. By a rule of court of *Hil.* 26 *Geo.* 3. (a) a prisoner is declared super-sedeable, unless the plaintiff shall cause him to be charged in execution *within two terms next after trial had*, or final judgment obtained. Here the trial was had at the last summer assizes for *Wells*, when the plaintiff obtained a verdict; and the defendant ought regularly to have been charged in execution before the expiration of *Hilary* term last, which ended on the 12th of *February*. It appeared that final judgment was signed, and the committitur piece filed with the clerk of the judgments on the 10th of *February*, and that the committitur was also entered in the marshal's book within the term; all which are the acts of the party: but that the entry of the final judgment and of the committitur on the record, which are the acts of the officer of the court, were not completed till the 21st of *February*, which was the *continuance day* (as it is called) of *Hilary* term. And the sole question was, Whether such entries by the officer on that day should have relation back to the preceding term, so as to satisfy the requisition of the rule of Court abovementioned?

This matter was several times discussed before the Court, who directed inquiries to be made as to the foundation of the practice of appointing a day after each term, known by the name of the *continuance day*, for the performance of acts, which ought regularly to be done

If the plaintiff's attorney sign judgment and file the committitur piece with the clerk of the judgments within the second term after trial had and verdict obtained against a prisoner, that is a sufficient charging him in execution within two terms pursuant to the rule of Court of *Hil.* 26 *Geo.* 3. tho' the final judgment and the committitur be not entered of record by the officer of the court till the *continuance-day* after such second term; provided such entries be then completed.

(a) R. and O. of K. B. 40.

within

1801.

Prison
against
Ravelling.

within the term. And it appeared that the continuance day is a day fixed by the Master at his discretion after each term, (though generally about the same period after the term,) regulated by the convenience of the officers of the court for the dispatch of business, but principally on behalf of the chief clerk to audit the accounts of the several officers under him. That the practice of appointing such a day had existed at least a century, and is referred to in a rule of court in the time of King *William III.* That it frequently happened, from the number of judgments and committures filed within the few last days of the term, that it became impossible for the proper officer to enter them upon the roll within the term, in consequence of which the practice had prevailed of completing the entries by the continuance day, as of the preceding term. In confirmation of which practice reference was made to an instance (a note of which was furnished by an officer of the court) which occurred about sixteen years ago upon a similar application made on behalf of a prisoner before Mr. Justice *Buller*; when the clerk of the Treasury (Mr. *Edge*), whose duty it is to enter up the final judgments upon the roll, attended before the judge, and stated that almost all the judgments are brought in within the last two, three, or four days of the term; that it was impossible for him to enter them upon the roll between the hours of shutting the clerk of the judgments' office at 7 o'clock on the last evening of the term, and the opening of the office next morning, even though he and his clerks were to write all night. That in consequence of this representation Mr. Justice *Buller* refused to discharge the prisoner; and informed Mr. *Edge* that he would take an opportunity before the next term of speaking to the other judges of the court on the subject. Accordingly on the first

first morning of the following term Mr. *Edga*, and Mr. *Benton* the then Master, were sent for into the judges' room, and informed by Mr. Justice *Buller* that he had consulted his brethren, who were all of opinion that it was reasonable that the officers of the court should have sufficient time allowed them to enter up the judgments and committiturs; and that in future they might take till the continuance day: under which authority the practice has continued from that time to the present.

1801.
 PRACTICE
 1801.
 RAWLINSON

Mingay and *Lambe*, in support of the rule, relied on the terms of the rule of court of the 26 Geo. 3. which was an express recognition and continuance in this respect of the former practice of the court, and must have been promulgated posterior to the supposed alteration of the practice introduced upon the authority of Mr. Justice *Buller*; even admitting that a private resolution of the judges of the court would supersede a public rule of court. That in *Unwin v. Kirchhoffe* (a) the very point in question was decided so long ago as M. 18 Geo. 2.; for there, upon a motion to supersede the defendant as not being charged in execution within two terms, the Court held, that the committitur must be actually entered on the record before the end of the second term; and that there was no extension of the time to the continuance day after term: nor was it sufficient that there was an entry in the marshal's book in time (b). This was again recognized in *Fotterel v. Philby* (c), H. 6 Geo. 3. and in *Woodbridge v. Forth* (d), Tr. 13 Geo. 3., and is laid down as the rule in the latest books of practice (e). That however the strict rule might

(a) 2 Stra. 1215.

(b) 1b. and vide *Wrightman v. Mullers*, 2 Stra. 1216.

(c) 3 Burr. 1241.

(d) 1b. in margin.

(e) Vide 1 *Tidd's Prac.* 220.

1801.

PEARSON
against
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have been relaxed in other cases, yet a prisoner was entitled to take advantage of any neglect or defect in the proceedings against him.

Erskine and *Burroughs*, in shewing cause against the rule, relied upon the alteration of the practice adopted sixteen years ago; and that it was not inconsistent with the rule of court of *H. 26 Geo. 3.*, for the entries when made referred back to the preceding term. That it was sufficient for the plaintiff to do every thing which was in his power within the two terms, which was done in the present case, and he could not be answerable for the acts of the officer of the court over which he had no control, and for which he ought not to suffer. That the practice itself arose out of the necessity of the case, it being impossible for the officer in many instances to complete the entries on the judgment roll within the term. That in the case of *Fotterel v. Philby* there was no entry of the defendant's commitment on the roll, nor any committitur piece filed in time to authorize its being so entered on the record: and that was probably the case in *Unwin v. Kirchaffe*, which is very shortly reported in *Strange*; which therefore differs those cases from the present, where the committitur piece was properly filed before the end of the term. That at any rate, as the practice had prevailed for so many years, by which alone the practisers could regulate their conduct, the Court would not set it aside in the present instance, whatever rule they might make in future.

Lord KENYON C. J. The only question now is, not upon the existence or validity of the rule of court requiring a prisoner to be charged in execution within the two terms after trial had, &c. but whether according to the
received

received practice of the court for the last sixteen years at least, it is not sufficient for the officer of the court to enter the final judgment and committitur on the record by the continuance day after each term, as of that term. It is by no means unusual to make entries of judicial acts *nunc pro tunc* by leave of the Court. This has sometimes been done after subsequent proceedings had, in order to warrant such proceedings, as by issuing a *fiery facias* in order to warrant a *testatum fiery facias* antecedently issued (a). Now here it appears that a very ancient practice subsists, recognized by a rule of court in the time of King *William*, (*E. 11 W. 3.*) for the secondary (b) of the court to appoint a continuance day after each term for auditing the accounts of the several officers, and completing other business relative to the term; and it has been considered, that the entries made by the proper officer by that day as of the preceding term are judicially entered of the term. A similar course of proceeding takes place at the assizes; where real actions are brought in the counties palatine, entries are made after the assizes are closed; and there is an ancient fee demandable in such cases called the *post diem fee*: and in this court also there is what is called the *post terminum fee*, payable on the same account. This practice is not impugned by the rule of court in 1786, which is in general terms, leaving it open to the construction put upon it by the practice in this respect.

LAWRENCE J. The practice has arisen from the necessity of the case. It is often impossible for the officer to

(a) Vide several instances of a similar kind collected in *Tidd's Prac* 240-1.

(b) Usually called the *Master*, though the other is the proper official appellation.

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against
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finish the entries on the roll within the term. It is therefore enough that the plaintiff does every act required to be done by him within the two terms. But the regularity of his proceeding can never depend upon the quantity of business which the officer has to do before the end of the term, or his expedition in completing it.

Per Curiam,

Rule discharged.

On the last day of the term Lord *Kenyon* delivered the following rule to the Master, which was read by him in court.

REGULA GENERALIS.

E. 41 Geo. 3.

Filing and entry
of committitur
against prisoners.

IT IS ORDERED, That from and after the first day of *Trinity* term next every committitur on every judgment obtained or to be obtained in this Court against any prisoner or prisoners shall be filed with the Clerk of the Docquets of this Court on or before the last day of the term in which such prisoner or prisoners is or are to be charged in execution. And the said Clerk of the Docquets shall enter such committitur on the judgment roll within four days next after the end of such term, exclusive of the last day of the term; unless the last of such four days be *Sunday*, and in that case within five days next after the end of such term: and that in default thereof such prisoner or prisoners shall be entitled to be discharged.

1801.

CUMING *against* SHARLAND, one, &c.Wednesday,
May 6th.

A Rule was obtained, calling upon the plaintiff to shew cause why the interlocutory judgment signed in this cause, and the writ of inquiry executed thereon should not be set aside for irregularity, with costs, &c. It appeared, that the bill was filed in last *Hilary* term, and the defendant obtained further time to plead by a judge's order till the 27th of *February*, upon the terms of pleading issuably, rejoining gratis, and taking short notice of trial for the then next assizes at *Exeter*. The declaration, which was in assumpsit, consisted of four counts upon special agreements, and four other general money counts: and on the said 27th of *February* the defendant filed special demurrers (alleging sham causes of demurrer) to the four first counts, and pleaded non assumpsit and the bankruptcy of the defendant to the four last counts. It was objected to the defendant's agent at the time, that the special demurrers, not affecting the merits of the case, were not issuable pleas within the meaning of the judge's order; and it was proposed to him to strike them out and put in issuable pleas, so that the cause might proceed to trial at the ensuing assizes. This however being denied, and the regularity of the pleading insisted upon, the plaintiff on the 2d of *March* signed judgment in the cause generally upon the whole declaration, as for want of a plea, and gave notice of executing a writ of inquiry on the 16th of *March*, being the commission day of the assizes at *Exeter*. After which the plaintiff again offered to waive the judgment and proceed to trial on the merits, if the defendant would withdraw his special demurrer, but without effect. The plaintiff then proceeded to execute his writ of inquiry,

Where a defendant under an order to plead issuably puts in a sham demurrer to some of the counts in the declaration and pleads issuably as to the rest, the plaintiff may consider the whole as a nullity, and sign judgment as for want of a plea.

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against
SHARLAND.

quiry, and recovered damages 1914*l.* 13*s.* 5*d.* on the four first counts, and 495*l.* 11*s.* 9*d.* on the remaining counts.

Gibbs and *Burrough* shewed cause against the rule, and contended, that where a defendant who prayed for an indulgence, in having further time to plead than by the general rule he was entitled to, obtained it upon the condition of pleading issuably, that condition is entire and goes to the whole declaration; and therefore if he do not plead issuably as to the whole, it is the same as if he had not pleaded at all within the time allowed, and consequently the plaintiff may sign judgment as for want of a plea, although the defendant may have pleaded issuably to some of the counts. For otherwise, if the condition were split and made several as to each count, the whole object of it, which is to prevent delay, would be defeated. Now though a demurrer, which goes to the substance of the declaration, be an issuable plea within the rule, yet a sham demurrer like the present is in fraud of the leave of the court and a mere nullity. And they cited *Sutton v. Wad-dlove* (a) as in point.

Dampier, contra, admitted that the demurrers to the four special counts were tantamount to an admission of the plaintiff's cause of action in those counts, and therefore that the plaintiff might have taken judgment upon them; but contended that he was not authorized to sign judgment generally as for want of a plea, the effect of which is to make the defendant admit the cause of action in the other counts also, in contradiction to his issuable pleas thereto. The proper course to have taken would

(a) *Q. R. Barnes*, 314.

have been to have gone to trial upon those counts to which issuable pleas were pleaded, and to have taken judgment by nil dicit as to the others; in which case the venire issues as well for the purpose of inquiry and of assessing damages on the latter as for trial generally on the former. By this method no detriment or delay can happen to the plaintiff; but if the practice were otherwise, a defendant might be subjected to great hardship, where the plaintiff comprehended several distinct causes of action in the declaration; in which case, though he were willing to admit the cause of action in some of the counts, by suffering judgment by default as to those, and thereby saving the expence of a trial, yet according to what is now contended he would be precluded from so doing by his undertaking to plead issuably to the whole declaration. The contrary however is well known. The case cited was in replevin, where the defendant having made two avowries, and one of them being unanswered, it was sufficient to entitle him to judgment; which distinguishes it from the present case.

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LORD KENYON C. J. The interest of the public is never better advanced than when we can inculcate by our rules the advantage of acting honestly. The defendant here seeks to set aside proceedings which have been induced by his own fault. An action was brought against him, and not being prepared to answer it at the appointed time, he applied for the indulgence of further time to plead, which the Court granted upon the usual terms; which in effect are no more than these, that he should bring forward his real defence, if he had any, at once, and not entangle the plaintiff in the mere forms of pleading. The defendant, after this undertaking, had the option of denying the whole charge, or of letting judgment go by default as to such

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CUMING
against
SWARLAND.

parts of it as he was ready to admit, and denying the rest. Instead of which, for the sake of perverting justice and creating delay and expence, he only pleaded issuably to some of the counts, and put in sham demurrers to the others. This is not a fair compliance with the judge's order, but a palpable evasion of it; and therefore I am glad that he has met with his desert; that the plaintiff has signed judgment as for want of a plea, which he had a right to do. The consequence is, that this rule must be discharged with costs.

GROSE J. The most advantageous construction of the rule for pleading issuably is, that it should go to the whole of the declaration; otherwise the object of it will be defeated.

LAWRENCE J. There is no objection under the terms of the rule to the defendant's letting judgment go by default as to some of the counts which he is disposed to admit, provided he pleads issuably to those which he means to deny. But he shall not be permitted to evade the rule, by pretending to give a special answer to part which has nothing to do with the merits of the case.

LE BLANC J. The object of the rule is to expedite justice, and not to entangle it: and therefore a defendant shall not be suffered to take advantage of the indulgence granted to him in the first instance merely to create further delay.

Rule discharged with Costs (a).

(a) Vide *Waterfall v. Glode*, 3 Term Rep. 305. S. P. But where the defendant was advised that there was substantial ground of demurrer, the Court set aside judgment signed as for want of a plea, on terms. *Berry v. Anderson*, 7 Term Rep. 539.

1801.

KNIGHT *against* KEYTE.Thursday,
May 7th.

THE affidavit to hold to bail in this case was made by the clerk and agent of the plaintiff, (whose usual place of residence was near *Kidderminster* in *Worcestershire*;) and stated in express terms, that the defendant was indebted to the plaintiff in 210*l.* for timber sold by him to the defendant; and that the defendant had made no tender in bank notes (a), &c. to the plaintiff, or to the deponent as his clerk and agent.

An affidavit to hold to bail made by the agent of the plaintiff, expressly negating a tender in Bank notes of the debt to his principal as well as to himself, is sufficient, tho' the plaintiff himself were not therein stated to reside abroad.

Lambe shewed cause against a rule for discharging the defendant on common bail, obtained on the ground of the incapacity of the agent to swear to such a negative, namely, that no tender was made to his principal. He answered, that it was sufficient that the agent had sworn positively to the fact; of which he might well have, and had in this case, ample means of information: for his principal was abroad at the time, and all the business was conducted by himself. The affidavit here is more precise than that in *Munro v. Spinks* (b), where an agent of the plaintiff residing abroad only negated the tender, according to his belief, which was deemed sufficient.

Espinasse, contra, relied upon *Smith v. Tyson* (c), where it was holden, that an affidavit made by the plaintiff's clerk expressly negating a tender in bank notes to the plaintiff was bad, because the clerk could not have certain knowledge of such a negative fact not relating to himself. And there is no reason here why the plaintiff himself re-

(a) According to the requisition of the stat. 37 *Geo.* 3. c. 45.(b) 8 *Term Rep.* 284.(c) 2 *Bos. & Pull.* 339.

1801.

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against
LEVY.

siding in this country, to whom that fact must be best known, should not have joined in the affidavit.

Per Curiam. There is no ground for such an objection. There can be no such rule, as that an agent cannot swear positively to the fact of there having been no tender to his principal. Suppose the latter resided in the *East Indies*, and the business had passed through the agent's hands alone. The Court cannot tell what means the agent may have for satisfying himself of the fact: it is enough for this purpose if he take upon him to swear positively (*d*) to it.

Rule discharged.

(*d*) Where the plaintiff resides in England it is not enough for the agent to negative the tender of the debt in Bank notes "to the best of his knowledge and belief." *Coff v. Levy*, 8 Term Rep. 520.

Friday,
May 8th.

DOE on the several Demises of FOQUETT and
Others against WORSLEY, Clerk.

Cross remainders cannot be implied in a deed; and can only be raised by proper words of limitation; however plainly expressed the intention of the parties may be. Under a limitation in a marriage settlement to the use of all and every the daughter and daughters of, &c. to be begotten, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters; and for default of such issue to the right heirs, &c. held that there were no cross remainders between the daughters or their issue.

THIS was an ejectment brought for the recovery of three undivided fourth parts of certain messuages and lands in the several parishes of *Arreton*, *Godsbill*, and *Gatcombe* in the county of *Hants*. The declaration contained counts on four several demises, 1st, of *Lancelot Foquett* deceased, laid on the 2d of *January* 1794; 2d, of *Richard Foquett* the elder, laid on the 2d of *January* 1798; 3d, of *Richard Foquett* the younger, laid on the 1st of *January* 1800; which several demises were each of them for three undivided fourth parts of the premises in question; and

4thly, on the demise of *Richard Foquett* the younger, for one undivided fourth part of the premises, laid on the 1st of *January* 1300. The defendant having appeared as landlord, and pleaded the general issue, the cause was tried before *Thomson B.* at the last assizes at *Winchester*, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

1801.

DOE d. FO-
QUETT
against
WORSLEY.

By indentures of lease and release dated the 22d and 23d of *February* 1699, made between *Lancelot Colman*, *John Read*, and *Heßler* his wife, mother of the said *Lancelot Colman*, of the first part; *David Urry* the elder, and *David Urry* the younger, of the second part; and *Mary Urry* spinster, grand-child of the said *David Urry* the elder, of the third part; being the settlement made in consideration of the intended marriage between *Lancelot Colman* and *Mary Urry*, the premises in question were conveyed by the said *Lancelot Colman*, *John Read*, and *Heßler* his wife, to *David Urry* the elder and *David Urry* the younger, their heirs and assigns, to hold to them their heirs and assigns, to the use of *Lancelot Colman* and his assigns for 99 years, if he should so long live; remainder to the use of *David Urry* the elder and *David Urry* the younger and their heirs, during the life of *Lancelot Colman*, in trust to preserve contingent remainders; remainder to the use of *Mary Urry* for her life; remainder to the use of the first and other sons of the body of *Lancelot Colman* on the body of the said *Mary* to be begotten severally, successively, and respectively, one after another, in order and course as they and every of them shall be in seniority of age and priority of birth, and the heirs of the body and bodies of all and every such son and sons lawfully issuing, the elder of such son and sons and the heirs of his body

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issuing being always preferred to take before the younger of them, and the heirs of his and their body and bodies issuing; and for default of such issue, *remainder to the use of all and every the daughter and daughters of the body of Lancelot Colman on the body of the said Mary lawfully to be begotten, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters lawfully issuing; and for default of such issue, to the use of the right heirs of Lancelot Colman for ever; and to and for no other use, intent, or purpose whatsoever.* The marriage took effect, and *Lancelot Colman*, who survived *Mary* his wife, died intestate in 1745, leaving issue by his said wife two sons and four daughters, (viz.) *Urry Colman* (the eldest son), *David Colman*, *Thomassin* (wife of *John Foquett*), *Hester Colman*, *Mary Colman*, and *Ann Colman*, and no other issue. *Urry Colman*, on the death of his father *Lancelot*, entered into possession of the premises as eldest son of the said marriage. *David* his younger brother, and *Hester Colman*, and *Ann Colman*, his sisters, died without issue in his lifetime: and *Urry Colman* having continued in possession of the premises until December 1774 then died without issue; having by his will dated 26th of May 1772 devised the premises to *James Worsley*, the defendant's brother, in fee. *Thomassin Foquett* also died in the lifetime of *Urry Colman*, leaving issue two sons, viz. *Lancelot Foquett* her eldest son, and *Richard Foquett*, father of the lessor of the plaintiff, and no other issue. On the death of *Urry Colman* without issue in 1774, *James Worsley* as devisee of *Urry Colman* entered into possession of two undivided fourth parts of the premises, viz. the two fourth parts which *Hester Colman* and *Ann Colman* would have taken had they survived *Urry Colman*; and continued in possession and received and enjoyed

joyed the rents and profits of the said two fourths from the death of *Urry Colman* until 1787, when he died; having by his will devised all his real estates to the defendant in fee. And the defendant on the death of *James Worsley* entered upon, and has since continued in possession of the two undivided fourths of the premises, and received and enjoyed the rents and profits thereof; and in *Easter* term 1793 levied a fine sur conuzaunce de droit come ceo, &c. for the said two undivided fourth parts; the use of which fine was by an indenture dated 6th *February* 1793 declared to be to himself in fee. On the death of *Urry Colman*, *Mary Colman* entered into possession of one undivided fourth part of the premises, and continued in possession, and received the rents and profits thereof until *April* 1794, when she died without issue and unmarried; and on her death the defendant, as devisee of his brother, who was devisee of *Urry Colman*, entered into and has since continued in possession of the said undivided fourth part of the premises, and received and enjoyed the rents and profits thereof. On the death of *Urry Colman* as aforesaid, *Lancelot Fequett* entered into possession of one other undivided fourth part of the premises, and continued in possession, and received and enjoyed the rents and profits thereof until 1797, when he died without issue: and on his death *Richard Fequett* the younger, son of *Thomas Fequett*, and father of the lessor of the plaintiff, entered upon possession of the last mentioned undivided fourth part, and continued in possession thereof until 1798, when he sold and conveyed the same to the defendant in fee by indentures of lease and release and common recovery. *Richard Fequett*, father of the lessor of the plaintiff, died in 1799, leaving the lessor of the plaintiff his only son and heir at law. The lessor of the plaintiff

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WORSLEY.

made an actual entry upon the premises on the 26th of December 1800, and was then ousted therefrom by *Thomas Lake*, the tenant in possession to defendant, of the premises in question, except such as are situate in *Gatcombe*. The question for the opinion of the court was, Whether the plaintiff were entitled to recover the whole or any part of the premises in question, and on which of the counts?

Sturges, for the lessor of the plaintiff contended, that under the limitation, "to the use of all and every the daughter and daughters of the body of *L. C.*, on the body of *M.* to be begotten, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters lawfully issuing; and for default of such issue, to the right heirs of *L. C.*" &c.; the daughters took cross remainders in tail; and consequently that the lessor of the plaintiff, being the only surviving issue of any of those daughters, was entitled to the whole estate, except the part which had been sold by his father to the defendant. He admitted that cross remainders could not be raised by *implication* in a deed, nor even in a will between more than two, without some words to shew such an intent: but here he contended that cross remainders were *expressly* created by necessary construction of the words of the settlement. In *Doe v. Wainwright* (a), it was said that no technical precise form of words was necessary to raise cross remainders. That was a case of construction upon a deed, where cross remainders were raised, though not created in the usual terms of conveyancing: and there stress was laid on the

(a) 5 Term Rep. 427.

limitation over being, "in case *all* the children should "die without issue;" which word *all*, it was said, could not be satisfied without determining that there should be cross remainders between the children. Now here the relative word *such* ("for default of *such* issue,") is at least tantamount to the word *all*; for it refers to its antecedent, "*all and every* the daughter and daughters." As the ultimate remainder, therefore, could not take effect till failure of the issue of all the daughters, they must take cross remainders by necessary construction of those words, coupled with the prior limitation to the *heirs* of the body and bodies of all and every of them. The propriety of this construction is much strengthened by the consideration that the question arises upon a marriage settlement, where the primary object is to preserve the estate amongst the children of the marriage, so that no part of it should go over as long as any of them survived. This is so much the general presumption, that in all the cases from that in *Dyer*, 303. *b. pl.* 49. down to *Doe d. Tinner v. Dorvell* (a), (upon which the defendant is supposed principally to rely;) such as *Davenport v. Oldis* (b), *Comber v. Hill* (c), *Williams v. Brown* (d), *Pery v. White* (e), and *Phipard v. Mansfield* (f), the Court have always distinguished against raising cross remainders where the word *respective*, or some synonymous expression was used in the limitation to the heirs of the bodies of the first takers in common or in joint tenancy. But the case of *Wright v. Holford* (g) is directly in point for construing the words in this settlement to create express

1801.

DOE d. FORTY-
ONE
QUEST
AGAINST
WORSLEY.

(a) 5 *Term Rep.* 518.(b) 1 *Atk.* 579.(c) 2 *Sira.* 969.(d) *Ib.* 996.(e) *Corup.* 777.(f) *Ib.* 797.(g) *Ib.* 31.

1801.

DOE d. FO-
QUETT
against
WORSLEY.

cross remainders. There the limitation was, in default of sons, "to the use of *all and every* the daughter and "daughters of *P. H.* and *C. H.* to be begotten, and to the "heirs of *their body and bodies*, as tenants in common, &c. "and for default of *such* issue, to the right heir," &c. There it was contended by Mr. *Hargrave* for the defendant, that those words not only furnished a *necessary implication*, but *expressly created* cross remainders between the daughters. That the words, "for default of *such* issue," could not be construed in any other manner than as relative to the issue of *all and every* daughter. And the Court, in the certificate which was afterwards sent to the Chancellor, held, that the daughters must take cross remainders, because the limitation over was of the *whole* estate, "upon the express contingency of failure of all "and every the daughter and daughters, and the heirs "of their *body and bodies*; and the limitation over on "default of *such* issue, was to the heir at law." It is probable, therefore, that the court adopted the argument of the defendant's counsel; to which no objection was made; while on the other hand, at the beginning of their certificate, they observe that there are no words intimating an intention to limit over the *respective* shares of the daughters dying without issue; which Lord *Mansfield* afterwards said was introduced in order to answer the cases of *Comber v. Hill* and *Williams v. Brown*, and to satisfy the doubts of Mr. Serjt. *Hill*, who argued for the plaintiff. It is true that that was a case of construction upon the words of a will; but that cannot vary the question; because, if the Court thought that such words did *expressly* create cross remainders, the same words must necessarily carry the same meaning in a deed, since,

as was holden in *Dee v. Wainewright*, no technical form of words is necessary to be used in a deed for that purpose.

1801.

Doe d. Fe.
QUETT
against
Worslett.

Eaft for the defendant said, that even if the question had arisen upon the words of a will, it might be doubtful whether cross remainders could be raised by implication in this case; for it was an established principle recognized in all the books, that as between more than two the general presumption was against such an implication, unless there were any words used from whence the contrary intent was plainly to be inferred. This was admitted by Lord *Mansfield* in *Phippard v. Mansfield* (a), and adopted by the Court in *Pery v. White* (b). And in *Miller v. Moore* (c), which is referred to by Mr. Justice *Buller* in the lastmentioned case as having settled the rule respecting cross remainders by implication; Lord C. J. *Lee* said, "where the devise is to three or more, cross remainders cannot be holden, unless the intent be plain and unavoidable, and then the Court may be forced to determine in favour of cross remainders." Now here are no such words used from whence cross remainders have been implied in other cases. The words principally relied on are the limitation over being "in default of such issue." But in *Davenport v. Oldys* (d), Lord *Hardwicke* said, that no case could be cited where cross remainders had been adjudged to arise merely on those words: and that construction was rejected on words of a similar import in *Doe dem. Cock v. Cooper* (e). In some of the cases, where cross remainders have been raised by implication on simi-

(a) *Cowp.* 800.(b) *Ib.* 777-80.(c) 13 *Geo.* 2. MS. *Buller* J.(d) 1 *Atk.* 579.(e) *Ante*, 229.

1801.

DOE d. Fo-
QUETT
against
WORSLEY.

lar limitations, stress has been laid on the devise being of *all* the lands on which the limitation over was to operate, which shewed the testator's intent to be, that the ultimate remainder-man should take the whole together, and not in parts, as each preceding taker died without issue. Such were the cases of *Holmes v. Meynel* (a) and *Phippard v. Mansfield* (b). In other cases the limitation over was only to take place if *all* the preceding takers died without issue, which shewed a like intent: as in the case cited from *Dyer* 303. b. pl. 49. On a similar ground the case of *Wright v. Holford* (c), so principally relied on by the plaintiff's counsel, might be distinguished from the present, for that was a devise of "*all* the testatrix's undivided moiety." But whatever doubt there might have been if this were a case of construction upon the words of a will, it has been long settled that cross remainders cannot be implied in a deed. The case of *Newell v. Newell* (d) is very strong to this purpose; for there was a plain intent to create them which failed for want of strict technical words of limitation. That was a feoffment to the use of one in tail; remainder to *J. S.* and *J. D.* and the heirs male of their bodies; and for default of such issue of either of them, to the use of the *survivor* of them having issue male, and to the *issue* male of such issue male of their body; remainder over. By this *J. S.* and *J. D.* were holden to have several inheritances, and no cross remainders in tail, for default of the word *heirs*. This principle was also fully established in *Cole v. Levington* (e), *Twifden v. Locke* (f), and *Doe v. Wainewright* (g); in which latter

(a) *T. Ray.* 452.(c) *Corop.* 31.(e) 1 *Ventr.* 214.(g) 5 *Term Rep.* 427.(b) *Corop.* 800.(d) 1 *Roll. Abr.* 837.(f) *Ambl.* 665.

case there were express cross remainders created by proper technical words of limitation; and the only question was, which of the children they embraced by the application of the word *surviving*? To this purpose also the case of *Doe dem. Tanner v. Dorwell* (a) is directly in point. There an estate in default of appointment was conveyed to the use of “all and every the children of B. and the heirs of “their several and respective bodies lawfully issuing, as “tenants in common, &c. and in default of *all such* issue “to the use of the right heirs of the settlor.” Lord *Kenyon* there said, that if the question had arisen on the construction of a will, the argument that cross remainders might have been implied would have deserved consideration; for the ultimate limitation was given in default of *all such* issue, &c.; but that it had been properly admitted that in the case of a *deed* cross remainders could not be implied; and it would be removing the land-marks of real property to bring that rule into question. And there the Court held, that as each child died without issue, his share fell into the reversion. Now here it must be admitted, that cross remainders are not created by proper technical words of limitation: then if notwithstanding the want of such words they can be said to be expressed, it will be difficult to say what is an implication. All the cases of wills which have been referred to as supporting the construction of cross remainders go pointedly upon the ground of implication. It must also be admitted, that in this case by the words “share and share alike equally to be divided “between them,” &c. the daughters took as tenants in common (b) several estates of inheritance (c); and that

1801.

DOR d. F9-
QUETT
against
WORSLEY.

(a) 5 Term Rep. 518.

(b) *Lowecres v. Elight*, Cowp. 352. *Denn v. Goskin*, ib. 660. *Flier v. Wigg*, Salk 392.

(c) Co. Litt. 189. a.

1801.

DOX D. FO-
QUETT
against
WORSLEY.

in this respect there is no difference between a deed of uses and a common law conveyance (a). Then those several estates would, by the rules of the common law, descend and revert severally, unless there be a subsequent distinct limitation, with proper words of limitation, to carry each part over to the other daughters on failure of their respective heirs of the body. Without such words, however strong the intent may appear from other limitations to other persons, cross remainders, which are conveyances of new estates, can only arise, if at all, by implication. The certificate in *Wright v. Holford*, from whence alone the grounds of decision of the court can be collected, does not profess to adopt the argument urged for the defendant, that cross remainders were expressed in that case; but on the contrary states grounds which shew that they were implied. And in the absence of any authority for saying, that such was the opinion of the judges in that case, the Court would not presume that they had adopted a ground of construction unsupported by former authorities, and subversive of generally received doctrines; and that without assigning any reasons of their own. No aid can be derived from the consideration that this is a marriage settlement; for whatever latitude of construction may be admitted upon marriage articles, or however in some cases a settlement may be reformed by order of the Court of Chancery with reference to such prior articles, yet in a court of law the same rules of construction must apply to this as every other deed. And besides, here are no introductory words limiting the settlement of the estate to the descendants of the marriage, as long as any should remain. And the concluding words, though words

(a) *Rigden v. Vallier*, 2 Ves. 256. *Goodtitle v. Stokes*, 1 Will. 341. and *Doe v. Morgan*, 3 Term Rep. 765.

of course, seem intended to preclude any other estate being raised by implication, beyond what is positively expressed. He then intimated, that if the Court entertained any doubt on this point, which went to the whole of the action, he was prepared to shew that at least as to two fourths the lessor of the plaintiff was precluded from recovering by the operation of the fine, and the length of time which had run. But the Court said, they would hear the plaintiff's counsel reply on the general ground.

1801.
 ———
 DOE d. FO-
 QUETT
 against
 WORSLEY.

Sturges in reply maintained, that in the case of *Wright v. Holford* the Court had gone expressly upon the distinction of there being no words, such as *respectively*, or the like, to sever the titles; and that the limitation over being in default of *all* the issue, as the word *such* here imported, the rule of construction laid down as between two in favour of cross remainders should prevail: and this is supported by what Lord *Mansfield* said in the subsequent case of *Phippard v. Mansfield*. That in the case of *Nevell v. Nevell* there was no limitation by way of cross remainder to the heirs of the body, as there is here by the construction of the words "in default of *such* issue," which mean in default of the heirs of the body of all and every such daughter. And that in *Doe d. Tanner v. Dorrell*, the words "*several and respective*" being introduced in the limitation to the heirs of the body of the daughters brought that case within the distinction before established. That the concluding words in this case still left the construction open to what was before expressed, and that in this case cross remainders were before expressed.

LORD KENYON C. J. There is a great distinction between the case of *Wright v. Holford* and the present.

1801.

DOX d. Fo.
QUEST
again
WORTHY.

That was a case of construction upon similar words in a will, in which cross remainders may be raised by implication: this is the case of a deed in which by the practice of centuries no such implication can be raised. And it would be of most dangerous consequence to have this point disputed, upon which so many titles must depend. It has been often said that it would have been much better for the public if certain technical forms of words used in deeds of conveyance, the import of which is well understood, had been required to be adhered to even in the case of wills, though the intention of an hundred testators had been thereby defeated; for by degrees such words would long ago have slid into general use, and been well known; and thereby an infinity of doubt, litigation, and expence would have been saved. However we can now only lament that it has been otherwise settled in the construction of wills. But with regard to deeds the rule is positively settled, that there can be no implication whatever in a deed. It is probable that it was intended that no part of the settled estate should go over as long as there were any issue of the marriage remaining; but the parties have not said so. There are certain words used to express such an intention in deeds, which are well known (a): those have not been adopted in the present case, but the framers of this settlement have left that intention to be implied from other words, which cannot be done. I will not go through all the cases; because they are collected with great ability by Mr. Serjt. *Williams*, in a note in his

(a) See the usual form in the continuation of Mr. Serjeant *Williams's* note: upon *Cook v. Gerard, Saund.* 185-6.

edition of *Saunders' Reports* (a), to which I refer in general. They establish the proposition I have before laid down in respect to the construction of deeds, which never has been or can be suffered to be doubted, without affecting an infinite proportion of the property of the kingdom, and removing land-marks.

GROSE J. The distinction has been long known between raising cross remainders between two, and between more than two, even in the case of wills; and in arguing the case of *Phipard v. Mansfield*, I held myself bound to admit, that in the latter case the presumption was against raising them by implication, to which I remember that Lord *Mansfield* fully assented at the time. Then in order to distinguish this from the other cases, it is argued that here they are expressed. But there is a common appropriate mode of creating cross remainders in deeds, and at least it may be said, that that mode has not been adopted in this settlement. Then if they have not been expressed in proper technical terms, they can only be raised, if at all, by implication. But to imply cross remainders in a deed would be directly contrary to all the authorities and the settled rule of law.

LAWRENCE J. The argument for the lessor of the plaintiff rests principally upon the case of *Wright v. Holford*, where, upon a limitation very similar to the present, cross remainders were raised by implication. But that case has been well distinguished on the general rule on which the argument has turned: for there the question arose on the construction of a will, in which case cross remainders

1801.

DOX d. Fo-
QUETT
against
Worsley.

(a) *Ib.* 185, note 6.

1801.

Doe d. Fe-
 v. WETT
 against
 WORSLEY.

may be implied, and here it arises on a deed, where they cannot. That distinction which runs through the cases has not been denied: but it has been argued that the Court there held that cross remainders were *expressly* raised by the words there used. That however was not said by the Court; nor indeed did Mr. *Hargrave* so much argue that there were *express limitations* of cross remainders, as that the testatrix's *intention* to raise them was *expressly declared*. An express declaration of such an intent might do very well in a will, which would not suffice in a deed. As if a testator say, "that there shall be cross remainders" between daughters, &c. that would be sufficient to raise them in a will, though it would not do in a deed for want of proper words of limitation: for in order to raise cross remainders in a deed between the issue of the first takers, there must be a limitation to the heirs of the body, which is not necessary in a will. It is said that this is distinguishable from the case of *Doe v. Dorvell*, because of the word *respective* there introduced in the limitation to the heirs of the bodies of the children. But notwithstanding that word, if the intention of the parties to the deed could have prevailed without proper words to convey it, it was as plainly to be collected there as in any of the other cases referred to, in favour of raising cross remainders; for the remainder over was in default of *all* the issue; which was noticed by Lord *Kenyon*; and yet it was expressly said by his lordship, and so determined by the Court, and the contrary not attempted to be argued at the bar, that being the case of a deed, no such implication could be made. The question therefore in these cases is not Whether the parties to the deed have expressly declared their intention to raise cross remainders; but, Whether they

they have made use of such words as are necessary to raise them in a deed?

1801.

Dox. & Co.
 QUETT
 against
 WORSLEY.

LE BLANC J. The distinction is well settled, that in a deed cros remainders shall not be raised by implication; in a will they may. Here, however, it is contended, that cros remainders are expressly limited: but I agree with my brother *Lawrence*, that it is not sufficient in a deed, that you may collect such an intention of the parties from the words, but cros remainders must be expressly limited by proper words of conveyance. The argument urged by the counsel for the lessor of the plaintiff rather goes to shew, that here there is an express declaration of such an intent, than that there is an express limitation of cros remainders. The case of *Doe v. Dorwell* cannot be distinguished in principle from the words here used; for whatever the intent might have appeared to be, yet being the case of a deed, the distinction was expressly taken that cros remainders could not be implied. Therefore here there being no express limitation of cros remainders, the case falls within the rule established by all the authorities, and there must be judgment for the defendant.

Postea to the defendant.

M'CONNELL and VARLETT *against* JOHNSTON.

Friday,
 May 8th.

LAMBE moved for a rule to stay proceedings in an action of assumpsit, till security was given by the plaintiffs for the costs; one of them (*Varlett*) being a foreigner residing abroad, and the other a bankrupt in custody in execution for a debt. But

a foreigner residing abroad: and though the first-mentioned plaintiff be a bankrupt in execution for debt.

If one of the plaintiffs reside within reach of the process of the Court, security will not be required for the costs, though the other plaintiff be

1801.

M^cCONNELL
and VARLETT
against
JOHNSTON.

The Court denied the motion in the first instance, one of the plaintiffs being within the jurisdiction of the court, and within reach of its process, and not coming under any of the rules requiring security to be given for the costs (a).

(a) In *Webb v Ward*, 7 Term Rep. 206, an uncertificated bankrupt, in whose name an action of trover was brought, (though in reality under the direction of the assignees,) was required to give security for the costs: Lord Kenyon saying that the Court would not lay it down as a general rule that an uncertificated bankrupt must in all cases give such security: but that it was fair to require it where the action was brought for the benefit of the assignees. And in 1 Tidd's Prac. 446. a case is mentioned of *Sutton v. Sutton*, Trin. 38 Geo. 3. where upon the general ground the Court doubted whether an uncertificated bankrupt bringing an action should be compelled to give security for the costs, and ordered it to stand over till the following term.

Friday,
May 8th.

BARLOW against BISHOP.

Though a note were given to a married woman, knowing her to be such, with intent that she should indorse it to the plaintiff in payment of a debt which she owed him, (in the course of carrying on a trade in her own name by the consent of her husband,) yet the property in the note vested in the husband by the delivery to the wife, and no interest passed by her indorsement to the plaintiff: neither can the plaintiff recover upon the money counts under such circumstances.

THIS was an action by the indorsee of a promissory note against the maker, which note was drawn payable to one *Ann Parry* or order, at two months after date, for 41*l.* 10*s.* and by her indorsed to the plaintiff. The first count of the declaration was upon the note, to which were added the common money counts. It appeared in evidence before Lord Kenyon, at the trial at the last *Middlesex* sittings, that *Ann Parry* was a married woman, carrying on trade at *Birmingham* in her own name with the consent of her husband; and that the plaintiff, who lived in *London*, had furnished her with goods to the amount of the note, dealing with her as a feme sole. That the plaintiff after much delay, having pressed for payment, the defendant, with a view to serve Mrs. Parry, gave her the note in question, with knowledge

knowledge of her being married, and with a view that she should pay it over to the plaintiff, in order to stop his proceeding against her, which she did by indorsing it over to him. A verdict was taken for the plaintiff, with leave to the defendant to move the court to enter a nonsuit, if they should be of opinion that the plaintiff could not recover upon any of the counts.

1801.

~~Barlow~~
Barlow
against
Bishop.

Gibbs on a former day obtained a rule nisi for this purpose, on the ground that by the delivery of the note to *Ann Parry* for her use, it became the property of her husband, and she could not pass it away by her own indorsement. And that no consideration having passed for the note between these parties, nor indeed any consideration received for it by the defendant, the plaintiff could not recover upon either of the money counts.

Erskine and *Espinasse* now shewed cause against the rule; and admitting that by the delivery of the note to the wife for her use, the property vested in the husband; they contended, first, that as she carried on trade in her own name with her husband's consent, all acts done by her in the course of such trade must be taken to be with the knowledge and consent of her husband; and he having permitted her to indorse the note in question, it in effect became his own indorsement. But secondly, if the property in the note could not pass by her indorsement, though made with her husband's consent, then as the defendant knew that she was a married woman, and that the object of making the note payable to her was, that she might indorse it to the plaintiff, which by law was a nullity; it is the same in legal effect as if the note were either made payable to a fictitious person, in which

FOR.

Barlow
against
Bishop.

case it became payable to bearer, as in *Gibson v. Minet* (a); or as if it were made payable to the plaintiff himself, for whose use it was expressly given. Perhaps too, under the special circumstances of the case, the giving this note may be considered as evidence under the money counts of the defendant's having received so much money for the use of the plaintiff in payment of his demand upon *Ann Parry*; or, as in *Fenner v. Mears* (b), it amounts to an agreement by the defendant, to hold so much money for the use of the person to whom *Ann Parry* herself should indorse the note.

LORD KENYON C. J. I saved the point at the trial, not from any doubt entertained by myself at the time, but to give an opportunity to the plaintiff's counsel to see if there were any ground upon which the action could be sustained: but none has been or can be stated. It is clear that the delivery of the note to the wife vested the interest in her husband; and as he permitted her to carry on trade on her own account, and this was a transaction in the course of that trade, if she had indorsed the note in the name of her husband, I am not prepared to say that that would not have availed; as many acts of this nature may be done by a power of attorney; and the jury might have presumed what was necessary in favour of an authority from her husband for this purpose. But the indorsement being in her own name, it is quite impossible to say that she could pass away the interest of her husband by it. And this is not like a note payable to the order of a fictitious person to whom no interest can pass; but here the interest passed to the husband. Neither is there any colour for saying

(a) 3 Term Rep. 481. affirmed in Dom. Proc. 1 H. Blac. 569—625.

(b) 2 Blac. 1269.

that the plaintiff can recover upon the money counts. — No money passed between these parties. In *Fenner v. Mears* there was an express agreement to pay the money to any person to whom the bond should be assigned; it does not therefore bear upon the present case.

Per Curiam, Rule absolute for entering a nonsuit.

ALLEN *against* KEEVES.

Friday,
May 8th.

THIS was an action brought against the drawer of a bill of exchange payable to bearer for 20*l.*, bearing date the 18th day of the month. It appeared in evidence before Lord *Kenyon* at the trial at *Guildhall*, that the bill (which was a common banker's check) was in fact drawn on the 14th preceding, though bearing date four days afterwards, and was thus post dated, because it was not intended that it should be presented for payment till the 18th: whereupon it was objected that in effect this was a bill payable four days after date, and therefore ought to have been upon a stamp; otherwise the stamp-act would be entirely evaded, by drawing bills of the date on which they were intended to be payable. Lord *Kenyon* inclined to this opinion; but permitted a verdict to be taken for the plaintiff, with liberty to the defendant to move the court to enter a nonsuit, if upon examination of the act of parliament the objection appeared to be well founded.

A draft on a banker post-dated, and delivered before the day of the date, though not intended to be used till that day, requires to be stamped by the stat. 31 *Geo. 3. c. 25.*

The stat. 31 *Geo. 3. c. 25.* imposes a certain duty (increased by the stat. 37 *Geo. 3. c. 90.*) upon any bill of exchange, draft, or order for the payment of money on demand, and so much where payable otherwise than on demand; with a proviso (*f. 4.*) to exempt any draft or

1801.

~~WILLIAMS~~
 ALLEN
 against
 KENYON.

order for the payment of money to the bearer on demand bearing date on or before the day on which the same shall be issued, &c.

Gibbs having obtained a rule nisi for entering a nonsuit,

The Attorney-General and Wigley shewed cause, saying, that as no use was intended to be or could be made of the draft till the 18th, when it was payable, it was the same as if it had not been issued till that day. But

Lord KENYON C. J. after looking at the act, said, that the case was too clear for argument: the manner in which the clause of exemption was worded expressly excluded this case.

Per Curiam, Rule absolute for entering a nonsuit,

Friday,
 May 8th.

MCCLURE against DUNKIN, Knight.

In an action on a judgment recovered on a bond interest may be recovered in damages beyond the penalty of the bond.

IN assumpsit on a judgment recovered in Ireland, in Michaelmas term 1777, the declaration set forth a bond given by the defendant to the plaintiff, dated the 1st of July 1777, for 653*l.* 10*s.* 9*d.* (reduced to *English* money); a judgment recovered thereon as above mentioned, with costs and damages 1*l.* 19*s.*, and a revival of such judgment by scire facias in Easter term 1794; in consideration whereof the defendant promised to pay the said several sums, &c. The plaintiff also declared on the common counts. The defendant pleaded non assumpsit. And at the trial before Lord Kenyon C. J. at the sittings after last term,

term, the plaintiff obtained a verdict for 752*l.* 17*s.* 6*d.*, which included interest upon the judgment.

1801.

McCLELLAN
against
DONKIN

Upon a rule to shew cause why the verdict should not be reduced to the sum of 655*l.* 9*s.* 9*d.*, which was the amount of the penalty of the bond and the costs, &c. the the sole question was, Whether the plaintiff were entitled to recover interest on the judgment beyond the penalty of the bond, and costs of the judgment?

Gibbs shewed cause, and contended that the sum recovered by the judgment constituted a new debt; and therefore though in an action on the bond itself interest could not have been recovered beyond the penalty, yet after the judgment the bond debt became merged in another security, on which interest might by law accrue without any such limitation.

Burrough, in support of the rule, said, that this being the case of a foreign judgment, the doctrine of merger did not apply; for it was no more than evidence of the debt (a), and of no higher nature than the bond itself. The Court therefore were not precluded from referring back to the original security on which the judgment was founded; all which appeared upon the face of the declaration: and if according to the legal effect of that original security interest could not be recovered beyond a certain amount, the plaintiff ought not to be permitted to recover more in a different form of action for the same debt. To shew that interest could not be recovered beyond the penalty of the bond, he referred to *Bramley v. Goodere* (b),

(a) Vide *Walker and others assignees of Bean v. Witter*, Doug. 1. and the cases there cited.

(b) 1 Atk. 73

1801.

McCLURE
against
DUNKIN.

Tew v. The Earl of Winterton (a), Knight v. Maclean (b), and Wilde v. Clarkson (c).

LORD KENYON C. J. If this had been an action on the bond, the objection would have holden good; but after judgment recovered, transit in rem judicatam; the nature of the demand is altered: and this being an action on the judgment, it was competent to the jury to allow interest to the amount of what was due. In this respect I see no difference between a foreign judgment, and a judgment in a court of record here.

Per Curiam,

Rule discharged.

(a) 3 Brown Ch. Rep. 489.

(b) 1b. 496.

(c) 6 Term Rep. 303. which over-ruled *Ld. Constance v. Church*, 2 Term Rep. 388.

Saturday,
May 9th.

THE KING *against* THE INHABITANTS OF LILLINGTON.

A certificate directed to the parish of A. or any other in C. will operate upon delivery to the parish of B. which is also in C. By the stat. 8 & 9 W. 3. c. 10. such certificate need not be directed to any particular parish.

TWO justices removed *William Leeson*, *Sarah* his wife, and their children by name, from the parish of *St. Michael* in the city of *Coventry* to the parish of *Lillington* in the county of *Warwick*. The sessions on appeal confirmed the order of removal, subject to the opinion of this Court on the following case.

The pauper was born in the parish of *Lillington* in the county of *Warwick*, where his parents were legally settled. In 1751, when the pauper was very young, his father obtained a certificate from the parish officers of *Lillington*, whereby they acknowledged the pauper's father and mother

ther and the pauper to be their inhabitants legally settled in the said parish; and the said certificate was directed as follows, (viz.) "To the churchwardens and overseers of the poor of the parish of *Holy Trinity*, or any other parish, in the city and county of *Coventry*." The pauper's father and mother brought the pauper with them and the certificate to *Coventry*, and delivered the certificate to the parish officers of *St. John the Baptist* in the said city. When the pauper was about eight years of age, he was bound an apprentice to *J. S.* of *St. John the Baptist* for the term of eight years, and served his master accordingly in the said parish, and hath done no other act to gain a settlement. The counsel for *Lillingston* objected to the validity of the certificate, insisting that the same was not valid by reason of the uncertainty of the direction. But the court of quarter sessions were of opinion the same was a valid certificate.

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 ———
 The King
 against
 The Inhabitants
 of LILLING-
 TON.

Gibbs, *Reader*, and *B. Morris*, in support of the order of sessions, after stating the question to be, whether it were necessary to the validity of a certificate that it should be directed to that parish to which it was delivered, and under which the paupers were received and permitted to dwell there, were stopped by

Lord KENYON C. J., who observed, that it was a settled point that a certificate need not be directed to the particular parish to which it was delivered. That the only dictum to the contrary was a loose expression of his own in the case of *The King v. Wymondham* (a), which the principal

(a) 6 *Term Rep.* 552. His lordship most frankly and obligingly took the inaccuracy of expression upon himself, in exoneration of the reporters, who might probably from inadvertence have used a word which carries his opinion further than he intended,

1801.

The King
against
The Inhabitants
of LITTLE-
TON.

question in the case did not call for. So far what was said was right, that a certificate was not a transferable instrument from one parish to another; for then it would operate as a licence for vagrancy; that is, after it has performed its office in one parish, it cannot be taken to another for the same purpose; and so from parish to parish as often as the certificated person shall choose to remove himself.

The Attorney General and Clarke for the appellants contended, that the opinion alluded to, though contrary to the case of *Rex v. St. Nicholas, Harwich* (a), was founded in reason and convenience; and the reason given by *Wright J.* for the decision in that case, viz. that it is an acknowledgment by the certifying parish that the party named in the certificate is their parishioner, which is conclusive against them as to all the world, was certainly ill founded, and had been since over-ruled (b). That the certificate in question must be taken either to have been directed to the parish of the *Holy Trinity*, or not directed at all; and in either case it would operate as a licence for vagrancy, if by delivery to a parish not named it could have any effect; for the party to whom it is given need not produce it to the officers of the parish into which he went till he was about to be removed; and then he might carry it into whatever other parish he pleased. It would also open a door to collusion between parishes; for after the death of a pauper, who alone could in most cases prove the delivery, it might be handed over from one parish to another as the occasion required, and nothing

(a) *Burr. S. C.* 171.

(b) Vide *R. v. Bishopside*, *Burr. S. C.* 381. *R. v. Lubbenham*, 4 *Term Rep.* 251. and other cases.

would appear upon the face of it to shew that it was not granted to the particular parish by whom it was produced, who might prove it by a witness who had taken it out of the parish chest, ignorant of the circumstances under which it had been placed there.

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The King
against
The Inhabitants
of LILLING-
TON.

GROSE J. The act of the 8 & 9 W. 3. c. 30., upon which alone the question turns, does not require that the certificate should be *directed* to any particular parish. And in the case alluded to of *St. Nicholas, Harwich*, it was expressly determined, not only that no such direction was necessary, but that even a misdirection would not avoid the certificate.

LE BLANC J. The case of *St. Nicholas, Harwich*, has settled the point. And the expression made use of by Lord *Kenyon* in *R. v. Wyndham* must be taken with reference to the particular point then in judgment, beyond which it cannot be supported.

Per Curiam,

Both Orders confirmed (a).

(a) The *delivery* of the certificate gives it operation. *R. v. Wensley*, 5 Term Rep. 154.

DOE on the Demise of BRADSHAW against
PLOWMAN.

Saturday,
May 9th.

THIS was an ejectment for two messuages, two dwelling-houses, and two tenements. And after verdict

Ejectment will
not lie for a
messuage and
tenement.

Lambe moved in arrest of judgment, because of the uncertainty of the latter description; which, though it was holden

1801.

DOX dem.
BRADSHAW
against
PLEWMAN.

holden to be well enough in *Doe v. Denton* (a), yet that case passed by surprise and was not law, being contrary to adjudged cases; viz. *Goodtitle v. Walton* (b), and *Goodright v. Flood* (c). And after hearing

Mingay against the rule,

The Court, upon a review of the precedents, made the Rule absolute to arrest the Judgment.

(a) 1 Term Rep. 11. and vide *Cottingham v. King*, 1 Burr. 625. Ejectment for messuages, lands, &c. in Ireland with the *tenon and tenement* of B. and held well after verdict; as such denominations of land might be known *there*.

(b) 2 Stra. 834.

(c) 3 Will. 23. See also *Popham*, 197. March, 96. and several cases where an ejectment for a messuage or tenement was also holden bad after verdict. *Ney*. 86. 3 Mod. 238. 1 Sid. 295. 1 Ld. Ray. 171. and *Qto. Barnes*, 173.

Tuesday,
May 12th.

BRUDENELL and BROOKS against ELWES and Others.

A power of appointment under a marriage settlement unto and among all or any the child or

children of the marriage for such estates as the husband and wife, or the survivor of them, should from time to time, either with or without power of revocation, direct, limit, or appoint, may be executed by the survivor, after a joint appointment reserving to them and the survivor a power of revocation and appointment. But under such power, if the second appointment be to the daughter of the marriage for life, remainder to the eldest son for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons in tail, &c. remainder to the daughter in fee, all the limitation subsequent to that to the eldest son for life are void, as being an excess beyond the power; and the ultimate remainder dependant upon such intermediate limitations, though made in favour of one of the objects of the power, is also void; and shall not be accelerated by the event of such void intermediate limitations not having taken effect, for want of issue male of the eldest son, &c. to whom the appointment was made. For an appointment not good in its creation will not become so by subsequent circumstances. And such an appointment, being by deed, cannot be construed *cypres*, so as to give the sons estates tail, as perhaps might have been the case if the appointment had been by will.

John

John Cheveley the father and *Ferningham Cheveley* covenanted with *John* and *Isaac Jamineau* (trustees therein named) and their heirs, &c. that they would, within six months after the marriage, convey and assure the manor of *Garlands* and certain other lands in *Essex* therein mentioned, to the use of *Ferningham Cheveley* for life, remainder to *Louisa Mary* for life, remainder to the trustees and their heirs, upon trust to convey and assure all or any part thereof unto and among all or any the child or children of the body of *Ferningham Cheveley* on the body of *Louisa Mary* to be begotten, in such parts and proportions, and for such estate and estates, and with and under such charges, provisos, conditions, and limitations as *Ferningham Cheveley* and *Louisa Mary* or the survivor of them should from time to time by any deed or writing, either with or without power of revocation, to be by him, her, or them duly signed and sealed in the presence of three or more credible witnesses, or by his or her last will in writing testified in manner aforesaid, direct, limit, or appoint: And in default of such appointment, to the use of the first and other sons of the body of *Ferningham Cheveley* on the body of *Louisa Mary Jamineau* in tail male successively; remainder to trustees upon divers trusts, (which are since become incapable of taking effect;) remainder to the right heirs of *Ferningham Cheveley* for ever. The marriage took effect: and by indentures of lease and release of the 20th and 21st of September 1768, made between *Ferningham Cheveley* and *Louisa Mary* his wife of the one part, and *Isaac Jamineau* (the surviving trustee) on the other part, reciting the said articles, and that there was issue of the marriage then living two sons, namely, *Jamineau* and *Ferningham Cheveley*, and a daughter *Jane Cheveley*, all of whom had respectively attained

1803.

BRUDENELL
againſt
E. & W. &c.

Settlement.

1801.

FRIDENELL
against
ELWELL.

the age of 21 years; *Ferningham Cheveley* the elder (his father *John Cheveley* being dead) granted and conveyed unto *Isaac Jamineau* and his heirs the manor of *Gavlands* and other lands mentioned in the articles, to the use of him the said *J. C.* the elder for life; remainder to the use of *L. M.* his wife for life, by way of jointure; remainder to the use of all or any the child or children of the body of *J. C.* the elder on the body of *Louisa* his wife lawfully begotten and to be begotten, in such parts or proportions, and for such estate and estates, and with and under such charges, provisions, conditions, and limitations, as *J. C.* the elder and *L. M.* his wife, or the survivor of them, should from time to time by any deed or writing, either with or without a power of revocation, to be by him, her, or them duly signed and sealed in the presence of three or more credible witnesses, or by his or her last will in writing testified in manner aforesaid, direct, limit, or appoint. And in default of such appointment, then (in strict settlement) to the use of the first and other sons of the marriage successively in tail male; and in default of such issue, to the use of the settlor's right heirs. By indenture dated the 22d of September 1768, duly executed by *Ferningham Cheveley* the elder and *Louisa Mary* his wife of the one part, and *Ferningham Cheveley* the younger and *Jane Cheveley* of the other part, reciting the said articles and indentures of lease and release, and that *J. C.* the elder and *L. M.* his wife were desirous of making some provision for *Jane Cheveley* their daughter, and also for *Ferningham Cheveley* the younger, they the said *Ferningham Cheveley* and *Louisa Mary* his wife, by virtue of the power and authority reserved to them by the articles of agreement and indentures, directed, limited, and appointed unto
and

Joint deed of
appointment.

1801.

 BRUDENIAL
 against
 ELWES.

and to the use of *Jane Cheveley*, her heirs and assigns for ever, the reversion in fee expectant upon and to take effect in possession after the decease of *Ferningham Cheveley* the elder and *Louisa Mary* his wife, of and in the manor of *Garlands*, &c. upon trust, by demise or mortgage, &c. to raise 1000 *l.* for the benefit of *Ferningham Cheveley* the younger. In which deed there was a proviso, that it should be lawful for *Ferningham Cheveley* the elder and *Louisa Mary* his wife, and the survivor of them, from time to time, or at any time or times during the lives of them or the survivor of them, by any deed or instrument in writing, with or without power of revocation, sealed and delivered by them or the survivor of them, and in the presence of and attested by two or more credible witnesses, (but subject and without prejudice to the raising of the said 1000 *l.*) to revoke, alter, annul, or make void the said limitation or appointment thereby made to or in favour of the said *Jane Cheveley*, her heirs and assigns as aforesaid; and by the same deed or instrument in writing, or by any other such like deed or instrument in writing, to be by them the said *J. C.* the elder and *L. M.* his wife, or the survivor of them, sealed and delivered in the presence of and attested by the like number of witnesses, to direct, limit, and appoint all or any of the hereditaments and premises so thereby directed, limited, and appointed, unto or amongst all or any of the child or children of the body of *J. C.* the elder, on the body of *L. M.* his wife begotten, in such parts and proportions, and for such estate and estates, and with and under such charges, provisos, and limitations over, (but such limitations over to be for the benefit of some or one of the children,) as they the said *J. C.* the elder and *L. M.* his wife, or the survivor of them, should

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against
ELWES.

*Sole deed of re-
vocation and ap-
pointment.*

from time to time direct, limit, or appoint. The said 1000*l.*, provided for *Jerningham Cheveley* the younger by the last mentioned indenture, was soon afterwards raised by *Jane Cheveley* by a mortgage of her reversion of the manor, &c.; and before any other deed of revocation or appointment had been executed *Jerningham Cheveley* the elder died, in the life time of his wife, and without having had any other children. After his death, by indenture tripartite of the 29th of *March* 1773, properly executed by *Louisa Mary Cheveley* his widow of the first part, and *Jamineau Cheveley*, *Jerningham Cheveley*, and *Jane Cheveley*, her said three children of the second part, and certain trustees of the third part; reciting the several instruments before mentioned, and that *Jerningham Cheveley* the elder was since dead intestate, and without having made any further or other direction, limitation, or appointment with *Louisa Mary* his wife, &c. she the said *Louisa Mary Cheveley*, by virtue of the power reserved to her by the indenture of the 22d of *September* 1768, and in execution of the same, did revoke and make void the direction, limitation, and appointment in and by the said indenture made by her and her deceased husband in favour of *Jane Cheveley*, her heirs and assigns, (but without prejudice to the payment and security of the said 1000*l.* in favour of *Jerningham Cheveley*); and it was thereby further witnessed, that in order to the making a new and other direction, limitation, and appointment of and concerning the reversion in fee, as well of the manor of *Garlands* and lands before mentioned, (subject as without prejudice as aforesaid,) as also of certain other estates therein mentioned, the said *Louisa Mary Cheveley*, by virtue of the power and authority to her as such survivor reserved by the indenture of

the 22d September 1768, and in execution thereof, did, after appointing the reversion in fee expectant upon her death of and in other parts of the premises in the said articles and indentures mentioned to her sons *Jamineau* and *Jerningham*, and her daughter *Jane Cheveley*, and their issue, in manner therein mentioned, direct, limit, and appoint the reversion in fee expectant upon her decease, in the manor of *Garlands*, &c. to the use of *Jane Cheveley* and her assigns for life, sans waste; with a proviso that it should be lawful for *Jane Cheveley*, when she should be in the actual possession of the premises for life, by demise, lease, or mortgage of the premises for any term of years, to raise thereout 1000*l.* to be payable after her decease to such person or persons, and in such manner and form, as she by deed or will should direct or appoint; and subject to such direction or appointment, (if any such there should be,) from and after her decease, to the use of *Jamineau Cheveley* for life, sans waste; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male successively; remainder to *Jerningham Cheveley* the younger for life, sans waste; remainder to trustees, &c. remainder to his first and other sons in tail male successively; remainder to the use of *Jane Cheveley* in fee. And by the said indenture there is a full power of revocation and new appointment reserved to *Louisa Mary Cheveley*. But before any such further deed was executed, viz. on the 17th of *March* 1776, she died; leaving her three children all surviving. *Jamineau* and *Jerningham Cheveley* the younger are both since dead, without having had any issue male; and *Jane Cheveley* is also dead: and *Jamineau Cheveley* survived his brother

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 BRUDENELL
 against
 ELWES.

CASES IN EASTER TERM

1801.

BRUDENELL
against
ELWES.

and sister; and the aforesaid *Jane Cheveley* before her death made her will, duly executed and attested to pass real estates; whereby after reciting that she was entitled for her life, and also to the reversion or remainder in fee to the manor of *Garlands*, &c. she gave and devised her aforesaid reversion in fee, and all and singular her estate and interest whatsoever in the said manor and hereditaments, unto and to the use of the plaintiffs *G. B. Brudenell*, *G. Brooks*, and *Elizabeth Morley*, (which last is since dead) and their heirs, upon certain trusts in her will mentioned: and she died without revoking or altering her said will. Soon after her death the plaintiffs, the surviving devisees in trust under her will, contracted with the defendant *Elwes* for the sale of the manor and premises; but he afterwards objecting to the title of the trustees, they instituted a suit in Chancery against him and others, for the purpose of compelling him to complete his purchase; which coming on to be heard before the Lord Chancellor on the 6th of *August* 1800, his Lordship directed the above case to be made for the opinion of this court upon the following questions; viz. Whether the deed of appointment of the 22d of *September* 1768, which was executed by *Ferningham Cheveley* the elder and *Louisa Mary* his wife jointly, were, as to the estate thereby appointed to *Jane Cheveley*, well revoked by the subsequent deed of revocation and appointment of the 29th of *March* 1773, executed by *Louisa Mary Cheveley* alone? and if the same were well revoked thereby, whether *Jane Cheveley* took under the last mentioned deed of appointment any and what estate in the manor of *Garlands*, and the other premises in question, which she had power to dispose of by will.

Adam

1801.

BRIDENELL
against
LWES.

Adam for the plaintiffs. 1st, The deed of 1773 was not a good revocation of the deed of appointment of the 22d September 1768, not being made in conformity to or consistent with the articles of 1730, from whence the power moved. By those articles a power of appointment unto and among all or any of the children of the marriage, with or without a power of revocation, was given to the husband and wife *or the survivor of them*, to be exercised from time to time *by him, her, or them*. The words indeed are general, but the meaning evidently was, that if the husband or wife alone appointed, he or she alone might revoke their own appointment; but if both appointed, the revocation could only be by both: in other words, the same authority which made was required to revoke the appointment. The reason of this is evident; for it would have been nugatory to give a power of appointing jointly, if either singly could revoke the act: nor would it be reasonable that either might undo what both had determined to be the most proper method of providing for their family. Then the husband and wife having made a joint appointment by the deed of 1768, it was not competent for the wife after his death to revoke it and make a new appointment. Nor was it in their power by the deed of 1768 to reserve a power of revocation to the survivor of them larger than the articles and settlement allowed; or if so reserved, would it be valid? By the deed of appointment of 1768 *Jane Cheveley* the daughter took a vested remainder in fee after the determination of the life estates of her parents. But 2dly, If that deed were well revoked by the deed of 1773, *Jane Cheveley* still took a vested remainder in fee under it, which passed by her will to the plaintiffs. He admitted, that *unless* the case of *Duchess of Devonshire*

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Devonshire v. Cavendish (a) would support an appointment to the grandchildren, it was impossible to contend that the power here given enabled the husband or wife to make an appointment to any other than the children of the marriage. (And the Court intimating a decided opinion that the power could not otherwise be executed than among the children, he abandoned that point) (b). But he contended, that though the execution of the power were void as to the excess, yet the subsequent limitation over to one who was an object of the power would be good, as in *Crompe v. Barrow* (c); inasmuch as there were no children of *Jamieau* or *Jerningham Cheveley*, the sons, to whom estates for life were limited, with remainders to their first and other sons in tail male; in default of which issue the remainder over in fee was limited to *Jane Cheveley*. [Lord Kenyon C. J. Did not that case go upon the ground of its being an appointment upon a contingency with a double aspect; and therefore that the contingency which went beyond the power not having happened, it should not stand in the way of those who might take under the appointment in the event which happened, and who were within the power?] Admitting that distinction, still the appointment here may hold good by giving the sons estates in tail male, by the doctrine of *Cy pres*, in order to carry into effect the general intent; as in *Chapman v. Brown* (d), *Pitt v. Jackson* (e), and *Robinson v. Hardcastle* (f). Here the ge-

(a) Hil. 22 Geo. 3. B. R. cited in 4 Term Rep. 741.

(b) Vide *Alexander v. Alexander*, 2 Vesf. 640. and other cases referred to in this report.

(c) 4 Vesf. jun. 681.

(d) 3 Burr. 1626.

(e) 2 Bro. Cb. Casf 51.

(f) 2 Term Rep. 241. and 781.

neral intent was to give the sons estates for life, and the daughter *Jane Cheveley* the remainder in fee; and the particular intent was to give intermediate estates tail to persons who were not within the scope of the power, namely, the male descendants of the sons: therefore the only method by which the particular intent can be most nearly effectuated consistent with the general intent is, by giving the two sons successive estates in tail male, with remainder in fee to the daughter. [Lord *Kenyon* C. J. The doctrine of *Cy pres* goes to the utmost verge of the law, even in the construction of wills; and we must take care that it does not run wild. But it has never been applied to the construction of deeds. The cases cited were questions upon wills. Perhaps, no person has carried the doctrine further than I did when Master of the Rolls, sitting for the Lord Chancellor, in the case of *Pitt v. Jackson*. That also was the case of an appointment by will: and I know that great judges entertained considerable scruples at the time concerning that decision. It went indeed to the outside of the rules of construction; yet still I do not think it was wrong.] At any rate then this case is distinguishable from all the rest; inasmuch as the appointment of 1773 was made by a deed to which all the parties, being of full age, who were enabled to take under the power, and alone interested in it, were parties: their consent therefore will aid the execution of it in this manner; and it is not now competent to other parties to object to it.

Const contrà. First, It is now (a) clear that the wife after her husband's death had a power to revoke the for-

(a) Lord *Kenyon* in the course of the argument had expressed a strong opinion to this effect, which he afterwards repeated.

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 BRUDENELL
 against
 ELWES.

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against
ELWES.

mer joint appointment; such power is expressly reserved to the survivor of the husband and wife by the original articles and settlement. It is also clear, that under a power of appointment to children, grandchildren or other descendants cannot be included (a), but the power must be executed amongst the children alone. If, indeed, the execution of the power by the deed of 1773 were to refer back to the articles, it might be doubtful how far any part of the appointment was good: for, as was said by Buller J. in *Robinson v. Harcastle* (b), every execution of a power must be coupled with the power itself, so that those who claim under the execution must derive their title from the power. And he considered that an appointment for life only to a person not in esse at the creation of the power would be bad; and cited a case of the *Duke of Marlborough v. Lord Godolphin*, in *Chancery*, Tr. 33 Gro. 2. (c) in support of that position. [Lord Kenyon. An unborn child may be made tenant in tail, but not tenant for life, *with a limitation to his children as purchasers*. I remember hearing Lord Mansfield say, that when the case alluded to was to be argued in the House of Lords, there was found to be a mistake in the printed reasons on the part of those who opposed the execution of the power in the manner intended; for it

(a) *Alexander v. Alexander*, 2 Ves. 640.

(b) 2 Term Rep. 251.

(c) This, though differing in the title of it, seems to be the same case, or at least upon the same question, as the case reported in 5 Bro. P. C. 592. under the name of *Lord Charles Spencer and others against the Duke of Marlborough, Lord Godolphin, and others*. The attempt there was not merely to limit by a new appointment an estate for life to a person not in esse at the creation of the power, but further to limit an estate tail to the issue of such unborn person. Vide *supra*, what was said by Lord Kenyon on this subject; and *Godolphin v. Godolphin*, 1 Ves. 21. and *Thellusson v. Woodford*, 4 Ves. 227.

had been stated, that there could not be a limitation to an unborn child *for life*, but that was found to be wrong; for certainly there may be such a limitation: they therefore cancelled that reason and framed another, stating the proposition to be, that there could not be a limitation to an unborn child for life, with limitations to the issue of such unborn child in succession: and that doctrine was afterwards distinctly laid down by the learned Judge who delivered the opinion of the Judges in the House of Lords.] Admitting then that the power was well executed by the deed of 1773, as far as it goes, and that it will be only void for the excess, according to *Robinson v. Hardcastle* (a) and other cases; here it will be good as far as it gives estates for lives to *Jane Cheveley* and *Jamincan*; but the next remainder to trustees, who are not within the power, and all the subsequent remainders which depend thereon, will be void; and that will include the ultimate remainder to *Jane Cheveley* in fee, although she was within the power. For this purpose the cases before cited, and that of *Adams v. Adams* (b), are in point.

Adam in reply maintained that the deed of 1773, if not good as an appointment *Cy pres* of estates tail to the sons with the remainder in fee to *Jane Cheveley*, was altogether void as an appointment for life only to persons not in esse at the creation of the power. Then if void as a new appointment, it would also be void as a revocation, and therefore the deed of 1768 would be set up again.

(a) 2 Term Term Rep. 241.

(b) Corup. 651.

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 against
 ELWES.

1801.

BRUDENELL
against
ELWES.

Lord KENYON C. J. We shall certify our opinion to the Lord Chancellor. At present, however, I see no reason to doubt but that the appointment by the wife alone, by the deed of 1773, was a good appointment as far as it is warranted by the power, and that it is a good revocation of the prior appointment of 1768. The marriage articles meant to give a joint power of appointment to the husband and wife during their lives, and after the death of either, that the survivor should have equal power to revoke and make a new appointment. It seems clear that an equal degree of confidence was reposed in both husband and wife; and as it could not be foreseen what alterations the exigency of the family might from time to time require, it was thought more prudent to leave the survivor of them, whichever it might be, the same power to mold the appointment that had been committed to both while living. The next point is too well settled to be broken in upon. The wife had no power under the articles to appoint to the children of unborn children, but she was confined to execute her power among the children. So far, therefore, as she appointed an estate for life to the daughter *Jane Cheveley*, with remainder for life to *Jamineau*, she did well; beyond that she exceeded her power in appointing to the issue of *Jamineau*, and therefore the excess is void. But it is equally clear that she did not intend that the subsequent limitation over to *Jane Cheveley* should be accelerated; but it was made to depend upon the intermediate limitations to the issue of her brothers, and she was not to take till their issue male were extinct. Those intermediate limitations therefore being void, the ultimate remainder dependent upon them must also fall. If, then, the appointment

were

were originally bad for the excess, the subsequent circumstances of the death of the brother, without having had issue, cannot make it good. The appointment must be legal at the time of its creation. Therefore the estate must go in default of appointment, beyond the estates for life given to *Jane* and *Jamineau*, according to the directions of the settlement, to *Jamineau* in tail male, remainder to *Ferningham* in tail male, with remainder to the right heirs of the father.

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 BRUDENELL
 against
 ELWES.

LAWRENCE J. The case of *Robinson v. Hardcastle* is in point (a).

Afterwards the following certificate was sent to the Lord Chancellor:

This case has been argued before us by counsel; we have considered it, and are of opinion, that the deed of appointment of the 22d of *September* 1768, which was executed by *Ferningham Cheveley* the elder and *Louisa Mary* his wife jointly, was, as to the estate thereby appointed to the said *Jane Cheveley*, well revoked by the subsequent deed of revocation and appointment of the 29th of *March* 1773, executed by the said *Louisa Mary Cheveley* alone. And we are of opinion, that under the said last mentioned deed of appointment, the said *Jane Cheveley* took an estate for life only in the manor of *Garlands* and the other premises in question, with a power to charge the same when she should be in the actual possession thereof, with any sum not exceeding 1000*l*. And that she did not take any estate in the said premises

(a) See *Bristow v. Ward*, 2 *Ves. jun.* 336. and the two following cases.

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under the said last mentioned deed of appointment, which she had power to dispose of by will.

May 18th, 1801.

KENYON *W.*

N. GROSE.

S. LAWRENCE.

S. LE BLANC.

T. Day,
May 12th.DOE on the Demise of JOHN BIDDULPH against
MEAKIN.

Under a devise of
 " a messuage or
 " tenement,
 " buildings,
 " lands, or pre-
 " mises, *now in*
 " *my own pos-*
 " *session*; and all
 " *other my real*
 " *estate whatsoever*
 " *ever in M. or*
 " *in any other*
 " *place,*" &c. to
 A. for life; and
 after her decease
 a devise of " *the*
 " *said messuage*
 " *or tenement,*
 " *buildings,*
 " *lands, and pre-*
 " *mises*" to B. in
 fee; held that
 the word *premises*
 used in the devise
 to B. carried all
 that was before
 given to A., and
 was not confined
 to the premises
 in the testator's
 own possession;
 and consequently
 that a reversion
 in fee of another
 messuage to
 which the testa-
 tor was entitled after the determination of a life in being, in whose possession it was outstand-
 ing during his lifetime, passed to the devise in remainder.

THIS was an ejectment for a certain messuage, out-
 houses, and land in the parish of *Stone* in the county
 of *Stafford*. At the trial before *Rooke J.* at the last assizes
 for *Stafford* several questions occurred; but the only
 one upon which the Court delivered any opinion was
 on the construction of the will of *Thomas Biddulph*, the
 grandfather of the lessor of the plaintiff, who claimed as
 heir at law, (through his said grandfather to his great
 uncle *William*;) against the defendant, who derived title
 under *William Biddulph*, the testator's youngest son and
 devisee. By that will the testator devised as follows:

" I give and devise all that my messuage, dwelling-house,
 " or tenement, with the shop, barn, stable, and other
 " buildings thereto belonging, *which said messuage or*
 " *tenement, buildings, lands, and premises, are now in my*
 " *own possession, and all other my real estate whatsoever, in*
 " *Murrey or elsewhere in the parish of Xoxall, (in the*
 " *county of Stafford,) or in any other place whatsoever in*
 " *Great Britain, to my wife S. B. and her assigns, for*
 " and during the term of her natural life: and from and

" after

“after her decease I give and devise *the said messuage or tenement, buildings, lands, and premises* unto my youngest son *William Biddulph*, his heirs and assigns for ever,” &c. He then gave to his eldest son *John*, the father of the lessor of the plaintiff, 1 s., and the same sum to others of his family; and then desired his wife to let his son *William* have the use and enjoyment of his work-shop and tools belonging to his trade of a blacksmith, during her life, without the payment of any rent or other consideration for the same. It appeared that the premises in question, which were a certain dwelling-house with the appurtenances, were never in the possession of the testator; he having only the reversion in fee, expectant upon the death of the widow of his brother old *William Biddulph*, who survived him, and died lately. A verdict was taken for the lessor of the plaintiff, with liberty to the defendant to move to set it aside and enter a verdict for himself, if the Court should be of opinion, that under the words of the will the reversion in fee in the premises in question passed to *William Biddulph* the son. And a rule nisi having been obtained for this purpose,

1801.

DOB
against
MEAKIN.

Erskine, *Benyon*, and *Peake* shewed cause, and contended that as in the devise to *William Biddulph* the testator made use, not of general words of reference to what he had before given to his wife for life, but of the particular words descriptive of the property in his own possession, which he had first mentioned before the sweeping clause, he must be taken to have intended to confine the devise to that identical property, according to the maxim, that an heir at law shall not be disinherited but by express words or necessary implication. And here the intention must at least be admitted to be doubtful,

1801.

—
DOE
against
MEAKIN.

ful. And they cited *Woodden v. Osbourn* (a), where one having lands called *Hayes*, extending into two villis, *Cokefield* and *Cranfield*, devised all his lands in *Cokefield*, call'd *Hayes-lands*, to his youngest son and his heirs; and if he died without issue, his wife was to have *Hayes-lands*: it was ruled that the wife should only have ~~the~~ ^{the} lands in *Cokefield*. And *Exner v. Hayden* (b), where a devise of "all a man's *messuages* and lands in *A.* and all his other "lands, meadows, and pastures" in *B.* was holden not to carry *houses* in *B.* In both cases the particularity of the description was considered to exclude the general operation of the words, though in themselves large enough to carry the whole property.

Leycester and *Milles* were to have argued in support of the rule.

LORD KENYON C. J. This is a very plain case. The testator after giving to his wife for life certain messuages and premises, which he describes as being in his own possession, with many unnecessary words, proceeds further to give her for the same term "all other his real "estate whatsoever in *Murrey* or elsewhere, &c. or in "any other place whatsoever in Great Britain." And after her decease he gives "the *said* messuage or tenement, buildings, lands, and *premises*" to his youngest son *W. B.* in fee. It cannot be pretended that if the reversion in these premises had fallen into possession in the life-time of the testator's widow, she would not have been entitled to enjoy them for her life; then how can we control the generality of the words of the devise

(a) *Cro. Eliz.* 674.(b) *Id.* 476.

over to the son, which certainly are large enough to carry the reversion of all that the widow was entitled to for life. In *Termes de la ley* (a), which is a very excellent book, it is said, in laying down rules for unlettered men to make their wills, that if one devise to J. S. all his lands and tenements, not only all his lands in possession pass, but all those also which he has in reversion, by virtue of the word *tenements*. Here too the word *premises*, with reference to what was before devised to the widow, would be sufficient to convey all. But it is said that it must be confined to premises in the testator's possession, because it is connected with such restraining words in the first clause; but that would be to reject all the intermediate words to which the *said premises* have a reference, and amongst them the devise of "all other his real estates whatsoever," &c. Though there be a particular description of property in a devise, yet if other general words are added, large enough to carry other property, they cannot be rejected, and the devise confined to the property particularly described; as was settled long ago in *Chester v. Chester* (b), and was holden more recently in *Freeman v. The Duke of Chandos* (c), when a remote reversion not in the contemplation of the parties passed by general words after a particular description.

LAWRENCE J. The word *premises* in the *first* clause meant the several things before mentioned; and according to the same sense in the last clause, it comprehends all that was then before described.

Per Curiam,

Rule absolute.

(a) p. 241.

(b) 3 P. Wms. 55—61.

(c) Cowp. 360.

1801.

DOE
against
MEAKIN.

1801.

Tuesday,
May 12th.JACOB *against* LINDSAY.

Where the plaintiff entered an account in writing of goods and cash furnished to the defendant from time to time, each page of which was authenticated by the defendant's acknowledgment in writing of the receipt of the contents; though such acknowledgment in writing cannot be given in evidence per se, in respect to the cash items amounting to above 40s in each page, for want of a receipt stamp, yet it is competent to the plaintiff to prove that upon calling over each article to the defendant he admitted that he had received the same; and the witness may refresh his memory by referring to the account.

THIS was an action for goods sold and delivered, money lent, paid, had and received, and upon an account stated, which was tried before *Thompson*, B. at the last *Winchester* assizes. The plaintiff, a salesman, had supplied the defendant, a seaman, with different sums of money and various goods from time to time, all which items were entered in a book. After the defendant was in custody under the arrest the plaintiff's clerk, (who had not himself made the entries, nor knew of the delivery of the articles,) went to the defendant and examined the book with him, article by article, sometimes the defendant and sometimes the clerk calling over the several articles, money as well as goods. The defendant admitted the receipt of each article, and said it was a fair account, and he had nothing to say against the charges. This book was put into the witness's hand at the trial, and he swore to the defendant's acknowledgment of each item separately in the manner stated. Upon production of the book it appeared that the items were entered in four different pages, and that *each* constituted one or more of the items in each page, to each of which the defendant's name was subscribed, sometimes at the bottom, sometimes in the middle of the pages. On the first page the defendant had written, "Received the contents above by me *James Lindsay*;" on the second, "Received the contents, *James Lindsay*;" on the third the same; and on the fourth, "Received, *Jas. Lindsay*." Whereupon it was contended on the part of the defendant that for want of the pages being stamped where the cash

cash items amounted to 40*s.* the evidence of the defendant's having admitted each article on its being called over could not be received so far as it went to charge the defendant with cash supplied him by the plaintiff. The benefit of this objection was reserved by the learned judge, and a verdict was found for the plaintiff for 126*l.* 17*s.* 5*d.* the balance of the whole account, subject to the reduction of 53*l.* 17*s.*, the amount of the cash items, if the Court should be of opinion that the evidence was insufficient for want of stamps on the receipts. A rule nisi having been accordingly obtained for reducing the damages,

1801.

 JACOB
against
 LINDSAT.

Dallar and *Jekyll* shewed cause. The book was not offered as evidence per se of the defendant's acknowledgment of the receipt of the money in writing; but the fact of his having received it was proved by the witness out of the defendant's own mouth, and the book was merely referred to in order to refresh the witness's memory of the several items which were so admitted. Neither was the admission made in general terms with reference to what was contained in such an account, which might have required explanation by the account itself; but this was a verbal admission by the defendant of each particular article read over to him at the time, to which the witness could depose of his own knowledge by refreshing his memory. The circumstance therefore of the defendant's signature was altogether immaterial.

Dampier and *Sturges* contra. The admission was made with reference to the several articles contained in the account which was read over by or to the defendant at the time. The book therefore was the best evidence of

1801.

JACOB
against
LINDSAY.

the particular items so admitted, and was necessary to be produced. Then, if necessary to produce the writing, which amounted in point of law to a receipt, it ~~originally~~ to have been stamped, and could not be supplied by parol evidence; because that was not the best evidence of which the nature of the thing, having been reduced to writing, was capable. The signature of the defendant made the account the best evidence of what he had received. The entries were not made by the witness himself, and therefore not like the common case where a witness, who has once had a distinct knowledge of the fact of the delivery of goods without reference to any account, is permitted afterwards to refresh his memory by entries made at the time.

Lord KENYON C. J. If this book had been tendered in evidence with the defendant's signature thereto as a receipt, or if his admission had had reference to the account so signed, certainly it could not have been given in evidence, and no parol evidence could have been received of the contents of the writing. But the objection taken does not apply to the case. For long after this receipt or acknowledgment in writing the defendant was asked by the witness whether he had had such and such articles of the plaintiff, and he acknowledged that he had: there is no doubt therefore that this was evidence to go to the jury of his having been furnished with those identical articles.

GROSE J. The evidence was not offered as evidence of a receipt, but the evidence was of a verbal admission by the defendant of his having had certain articles and
sums

sums of money from the plaintiff, proved, not by the signature to the account, but by the testimony of the witness to whom he made the admission.

1801:

JACOB
again?
LINDSAY.

LAWRENCE J. The book certainly could not be received in evidence as a receipt for the money by the defendant, for want of a stamp. In itself indeed the book having been kept by the plaintiff was no evidence at all against the defendant to charge him with the items of the account: but if there had been no signature added, it cannot be pretended but that if the witness had made use of it to ask the defendant whether he had had such and such articles contained in it, his admission would have been evidence against him; and the witness might afterwards have refreshed his memory at the trial by referring to the particular items to which such admission extended: Then if this use might have been made of the book without the signature, the defendant by putting his name to it cannot make it less evidence for the purpose for which it was produced.

LE BLANC J. The objection amounts to this, that there can be no verbal admission by a party of his having been furnished with certain articles in an account to which he had affixed his signature: but that cannot be supported.

Rule discharged.

1801.

Wednesday,
May 13th.ORMEROD *against* TATE.

An attorney has a lien upon a sum awarded in favour of his client, as well as if recovered by judgment: and if after notice to the defendant the latter pay it over to the plaintiff, the plaintiff's attorney may compel a repayment of it to himself, and he will not be prejudiced by a collusive release from the plaintiff to the defendant.

THIS cause being at issue at York Spring Assizes 1800, the parties entered into bonds to refer it to arbitration, and the arbitrator awarded the defendant to pay to the plaintiff 26*l.* by two installments, 10*l.* on the 24th of May 1800, and the remaining 16*l.* on a certain future day. On the 16th of May the plaintiff's attorney, having been informed that the parties intended to settle the matter between themselves for the purpose of ousting him of his lien on the costs, served the defendant with notice to pay the amount of the damages and costs to him, and not to settle the same with the plaintiff or any other person, as he had a lien upon the costs for his fees, &c. notwithstanding which the defendant on demand of the first installment by the plaintiff's attorney when it became due refused to pay it to him, but paid it over to the plaintiff himself, and obtained from him a receipt in full of all demands: and then told the attorney he would never pay him a shilling, and he might get his costs how he could. Thereupon a rule was obtained on the part of the plaintiff's attorney, calling on the defendant to shew cause why he should not pay him his costs in this cause out of the money awarded to be paid by the said defendant to the plaintiff, and also the costs of this application.

Gibbs shewed cause against the rule, and contended that the attorney's lien was confined to the cases of money recovered by the judgment of the Court, and did not extend to money awarded; and the rule being introduced merely for the sake of the officers of the court, in derogation of the natural rights of the parties to settle their

own disputes without the intervention of a third person, it ought not to be extended farther than it had gone. That at any rate it was competent to a plaintiff to release the whole or any part of the damages, though it might not be permitted to the defendant to pay the money over to the plaintiff after notice from his attorney of his lien.

1801.

 ORMEROD
against
 TATE.

The Attorney-General and Yates, contrà, relied upon the general practice as settled in *Welsh v. Hole* (a), *Read v. Duppa* (b), and *Randle v. Fuller* (c); and said that this was in effect the same case; there being a cause in court, and the damages only ascertained by an arbitrator instead of by a jury. And as to the pretended receipt in full or release, it was a mere juggle between the parties to cheat the attorney of his lien.

LORD KENYON C. J. The convenience, good sense, and justice of the thing require that an attorney should have the same lien on damages awarded as if they were recovered by the judgment of the Court in the ordinary course of the cause. The public have an interest that it should be so; for otherwise no attorney will be forward to advise a reference. As to the right of the plaintiff to release any part of the damages, it is out of the question here; for this appears to be no other than a mere shuffle between the plaintiff and defendant to cheat the attorney of his lien. Therefore,

Per Curiam, Rule absolute for the defendant forthwith to pay over to the plaintiff's attorney 10*l.* the amount of the first installment awarded to be paid to the plaintiff, and to pay the remaining installment when due to the plaintiff's attorney.

(a) *Doug.* 238.

(b) 6 *Term Rep.* 361.

(c) *Ib.* 456.

1801.

Saturday.
May 16th.

Ex parte ROBERT SOFTLY.

A keelman employed in navigating down the river Tyne to the port of Shields at the mouth of that river, is liable to be impressed; and cannot afterwards bring himself within the protection of the 13 Geo 2 c. 17. s. 2. exempting every person, not having before used the sea, who shall bind himself apprentice to serve at sea, from being impressed for three years from such binding

THIS came on upon a rule calling upon the commanding officer of his Majesty's hired tender the *Edwin-stowe*, to shew cause why a writ of habeas corpus should not issue to him to bring up the body of *Robert Softly*, who was in his custody in consequence of having been impressed. The rule was grounded on several affidavits, stating that on the 6th of May 1800 *R. Softly* a keelman was bound apprentice to T. S. for three years from that time, to learn the business of a mariner or seaman; and that on the 12th of the said May the Lords Commissioners of the Admiralty granted *Softly* a protection on the said indenture for the same period. That on the 9th of January last he was impressed on board of his master's ship in the river Tyne. That he had never served at sea, or been bound before to any other person to serve at sea. That the employment of a keelman on the river Tyne consists in receiving coals into certain vessels called keels at the coal wharfs on the banks of the river, and navigating such keels to the port of Shields or other parts of the river, and there putting the coals on board ships for exportation. That such employment does not render it necessary, nor do the men in performing it go out to sea, but are wholly employed on the river.

The affidavits on the part of the Crown set out the order of Council of the 3d of December 1800, whereby his Majesty, by the advice of his Privy Council, upon the urgency of the naval service, ordered the Lords Commissioners of the Admiralty to issue warrants for pressing so many "seamen, seafaring men, and others, whose occupations and callings are the work in vessels and boats
" upon

1801.

Ex parte
Sortey.

“ upon rivers, as should be sufficient to man his Majesty’s
 “ ships,” &c. and stated further, that *Softly* had been
 employed in keels navigating the river *Tyne* since he was
 about ten years of age, and has continued for the last five
 years in the same employ as a man. That on 22d of
December 1799 he was bound to *J. H.* coal-fitter at
Newcastle for a twelvemonth; that he continued em-
 ployed in a keel till *May* 1800, when he deserted his
 Master’s service and went to *Sunderland*, where he was
 bound with two others, under the like circumstances,
 to his present master *T. S.* That the keels employed on
 the *Tyne* are of about 21 tons burthen, and usually navi-
 gated by four persons, the skipper, two men, and a boy.
 That the chief employment of the keels is to carry coals
 from the staiths (or wharfs) to the ships in *Shields* har-
 bour, the nearest staith to which harbour is about a mile,
 and the furthest about 18 miles up the river *Tyne*.
 That the keels are navigated with one, and sometimes
 two masts and large lug sails, and sometimes with stud-
 ding sails and two oars, and steered with a rudder and
 tiller. That the sea at and near *Shields* harbour fre-
 quently runs high, and it requires great skill in the steer-
 ing and management of a vessel to navigate the keels;
 particularly in tempestuous weather, when the keels are
 often driven to near the mouth of the river, and some-
 times to sea. That the generality of keelmen are very
 expert in the trimming of their sails and handling their
 oars and rudder; and steer with great facility and pre-
 cision in narrow and intricate channels, and particularly
 in getting along side of vessels when the wind blows
 high; and that they occasionally assist ships in the river,
 and help to work and rig them. That the branch pilots
 of the *Tyne* are selected from this description of persons.

1801.

Ex parte
SOFTLY.

It was also sworn by several persons conversant with the impress service, that this description of persons were often impressed.

The Attorney General and Jervis shewed cause against the rule, and contended that the protection granted to *Softly* was not valid under the stat. 13 Geo. 2. c. 17. by virtue of which it was claimed. That is entitled "An act for the *increase* of mariners and seamen to navigate trading ships or vessels." By the 1st section a general protection is given, amongst others, to persons under 18 years of age, which does not apply to the present party; then *f.* 2., under which the exemption is claimed, enacts that, "for the encouragement of able bodied *landmen* to betake themselves to the sea service, every person of whatever age, who shall *use the sea*, shall be exempted from being impressed for two years from the time of his first *going to sea*: and that every person not having before *used the sea*, who shall bind himself apprentice to *serve at sea*, shall be exempted from being impressed for 3 years," &c. and by *f.* 3. persons so exempted shall have protections from the Admiralty. The validity, therefore, of the protection depends on the construction of the clause granting the exemption. Now the act which was for the *increase* of mariners, by giving protections to persons upon their entrance into the sea service, does not extend to such as were liable to be impressed before they entered into that service, in respect of which the exemption is claimed; for such persons do not come within the reason of the exemption. The binding of one as an apprentice to the sea service, who was before that time in a class of persons liable to be impressed as mariners, would not operate to the increase
of

1801.

Ex parte
Society.

of mariners, but would rather reduce the number of persons disposable at the public service. The right of pressing mariners for the navy is, says Mr. Justice *Foster* (a), a prerogative inherent in the crown, grounded upon the common law, and recognized by many acts of parliament. Amongst the latter he refers (b) to the act of the 2 and 3 *Ph. & M. c. 16.* which lays a penalty on watermen plying between *Graysend* and *Windfor*, for withdrawing themselves in the time of pressing by commission for the service of the crown upon the sea. Upon which he observes, that though it extends only to watermen on the *Thames*, yet it supposes the legality of such commissions, and that these people were the objects of them. A fortiori, therefore, persons of the description of these keelmen, who, though not used to go to sea, are employed in a laborious and sometimes dangerous navigation, which requires great skill and hardihood, in a large navigable river like the *Tyne*, must be liable to be impressed. Such persons come expressly within the words and meaning of the order of council on which the press-warrants are framed, which include not only *seamen* and *seafaring men*, expressly so called, but “others whose occupations and callings are to work in vessels and boats upon rivers.” That the legislature in the 13 *Geo. 2. c. 17.* had the protection of *landmen* principally in view, who had never before been subject to be impressed, may also be collected from other statutes passed in *pari materia*, viz. 7 & 8 *W. 3. c. 21. f. 15.* which enables the Admiralty to give protections for two years to “landmen desirous to apply themselves to the sea service.” 2 & 3

(a) *Fog. Cr. Law*, 159.(b) *Ib. p. 171.* and vide stat. 4 & 5 *Ann. c. 19. f. 18.*

1801.

Ex parte
Softly.

Ann. c. 16. f. 4; 5. and 15. protects poor boys bound by parish officers to sea in the merchant service till 18 years of age; and also, for three years, all such as shall voluntarily bind themselves. Then the stat. 4 & 5 Ann. c. 19. reciting that the last-mentioned act was intended for the encouragement of landmen to bind themselves apprentices to the sea service, and that the exemption had been abused by protecting seamen who had so bound themselves, enacts and declares, that no person of the age of 18 years shall be exempted from being impressed who shall have been in any sea service before the time they bound themselves, &c. It appears also from these statutes, that the term landman is used in contradistinction to seaman, and that all persons are considered as seamen who are liable to be impressed for the sea service.

Park, contra, admitted that the party was within the description of those who were liable to be impressed by the order of council: but contended that he was exempted by the special provision of the stat. 13 Geo. 2. c. 17. f. 2. which exempts all persons, not having before used the sea, who shall bind themselves apprentices to serve at sea. Now here the fact was positively sworn to, that Softly "had never served at sea, or been bound before to any "other person to serve at sea." By using the sea must be understood navigating upon the open sea. None of the acts referred to carry the argument further, because they all use the same description. And considering that they were all passed for the purpose of encouraging persons to embark in this mode of life, which is a nursery for the navy, under the faith of being protected from being impressed for a certain period, the words ought to be

bq

be construed in their plain and popular sense, adapted to the understanding of that description of men to whom they apply.

1801.

 Ex parte
Sortay.

Lord KENYON C. J. This case in its consequences is of infinite importance to the public, since the existence of the country depends upon its fleets. I have frequent applications made to me as Chief Justice, out of court, for discharging persons who have been improperly impressed: a power which, as Lord *Mansfield* said, had been exercised by Lord C. J. *Holt*, and long before his time: but I have never considered myself at liberty to discharge persons of this description. The power of pressing persons for the sea service is not general; it goes as far only as the safety of the country requires that it should, and there it stops. It extends to persons whose employment is upon the sea and in navigable rivers. There can be no question but that persons employed like this man upon the river *Tyne* are liable to be impressed. The only question then is, Whether he is protected under the act of the 13 *Geo. 2.*? I think not. That act was passed for the encouragement of landmen, persons not before used to a sea life, to follow the sea; for which purpose it gives them a protection from being impressed for a certain period. But it is said that this man did not before this time *use the sea*, and therefore that he comes within the exemption, though liable before to be impressed: but that construction would decrease the number of mariners disposable at the service of the state, instead of increase them as the object of the act purports to do. Besides, if it were necessary, I am not sure that the mouth of such a river as the *Tyne* is not in a general sense to be called the sea. Navigable rivers below the
bridges

1801.

 Ex parte
 SOFTLY.

bridges where the sea ebbs and flows are called *Æstuaria maris* (a). The rivers *Severn*, *Mersey*, and *Dee*, have outlets of the same description. The lower part of the *Severn*, which takes the name of the *Bristol Channel*, is no doubt the sea; and the outlets of the *Mersey* and *Dee*, which are called the estuaries of those rivers, are so likewise. It is clear, however, that the persons employed in this sort of navigation are not those inexperienced landmen whom the legislature, in order to encourage them to enter upon this mode of life, meant to protect for a time; for the keelmen are for the most part able and expert navigators; and an officer well acquainted with those parts, who joins in the affidavits, says he should prefer as a seaman a person of the age of 21, bred to the keels, to one who had been two voyages to the *East Indies*. This person it appears is of that age; and it is most obvious that he has bound himself apprentice, not for the purpose of learning his business, but in order to protect himself from being impressed. And I think we should be dealing away the security of the country, if we were to hold that the protection of the act extended to persons of this description binding themselves apprentices.

GROSE J. The only question is, Whether this party is protected by the act of parliament; that is, whether before he became bound he could be said not to have *used the sea*? The answer in the affirmative to the question which I put during the argument, namely, whether this person before he was bound was liable to be impressed, in my judgment decides the case; for the express object

(a) Vide 4 *Inft.* 139. 141. 2 *Halc.* 16. 54. *Hale de jure maris*, 12. 35. 46, 7.

of the act was to increase the number of mariners for the sake of the public service, and therefore to hold out an encouragement to landmen, who were not before liable to that service, to enter upon that mode of life. Whereas the construction now contended for would decrease the number of disposable mariners, by allowing protections to those who were before subject to be impressed. Therefore, though the words used are very general, yet they must be construed according to the obvious meaning of the legislature, and according to the usage which has always prevailed in respect to that class of men who are said to *use the sea*; in that sense persons not used to the sea are to be understood of landmen who were not before liable to be impressed.

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SOFTLY.

LAWRENCE J. I entertain some doubt whether this man does not come within the words of exemption of the act, exempting every person, not having before *used the sea*, who shall bind himself apprentice to serve at sea. And my doubt arises on this, that there are other descriptions of persons liable to be impressed, who yet do not *use the sea*; such as persons employed on navigable rivers, who are described in the order of council, without reference to their being so employed within the flux and reflux of the sea in such rivers: of this description are many persons employed in navigating upon the *Thames*, at various places between *London* and *Oxford*, who certainly cannot be said to have used the sea: and therefore, as the legislature, in describing the persons intended to be exempted, have used a term not co-extensive with the power of impressing; my doubt is, how far we are warranted in saying, that they only meant by these words to describe persons not before liable to be impressed. At the

1801.

Ex parte
Sootly.

the same time it must be admitted, that the introductory part of the clause goes to shew that this person is not entitled to be exempted; for the exemption is said to be given for the encouragement of able bodied *landmen* to betake themselves to the sea service: and the object of the act being to increase the number of mariners and seamen, seems also to favour such a construction as will not deprive the country of its right to avail itself of the assistance of any description of persons necessary for its safety, and who were before liable to be impressed. But certainly there is a difficulty in putting so large a construction on the enacting words of the clause giving the exemption.

LE BLANC J. The legislature at the time of passing the act of the 13 *Geo.* 2. seem to have had two descriptions of persons in contemplation; the one, landmen who required instruction in the new line of life in which they were about to engage, in order to fit them for their employment; the other, persons having sufficient skill in navigation to fit them for the sea service, without the necessity of an apprenticeship to it; and I consider the words, "not having before used the sea," to have been used in contradistinction to persons requiring a certain degree of instruction to fit them for the sea service. This party, therefore, from his former mode of life, not being within the latter description at the time of the binding, I do not consider as coming within the protection of the act.

Rule discharged.

1801.

VANDYCK and Others *against* WHITMORE.Monday,
May 18th.

THIS was an action upon two policies of insurance, both dated 17th March 1798, upon a voyage at and from *London* to *Rotterdam* or *Amsterdam*, with or without clearances, to or from a neutral port; the one being upon 137 boxes of sugar on board of a ship called the *Jonge Hendrick Vierland*, and on 42 boxes of sugar on board of another ship called the *Juffrouw Lydia*; the other on goods on board the said ship *Juffrouw Lydia*, declared to be 11 casks of sugar, valued at 330*l.* a quantity of coffee valued at 3735 *l.* and on 30 casks of tobacco, valued at 1380*l.* The defendant subscribed each of these policies for 300*l.* at a premium of six guineas per cent. The declaration contained counts upon each policy for a total loss by capture, and a count for money had and received. The defendant pleaded *non assumpsit*, and paid 23*l.* 12*s.* 6*d.* into court upon the count for money had and received. At the trial before Lord Kenyon C. J., at the sittings at *Guildhall* after last *Michaelmas* term, the jury found a verdict for the plaintiffs for 346*l.* 17*s.* 6*d.* subject to the opinion of this court on the following case. The ships *Vierland* and *Lydia* were *Prussian* ships. On the 20th of *December* 1797, the *Lydia* being then bound upon a voyage to *Calais*, and the plaintiffs intending to ship goods on board her for that port, obtained for that purpose an order of council. This order was dated 20th *December* 1797, and reciting a petition of the plaintiffs to export from *London* to *Calais* 100 hogheads of tobacco, &c. in the *Prussian* ship *Juffrouw Lydia*, granted permission to send supply and deliver the

It is legal to trade with the subjects of an enemy's country by the king's licence. But if it be provided in such licence that the party acting under it shall give bond for the due exportation to the places proposed of the goods intended to be exported to such country, and they are exported without such bond being given, such exportation is illegal, and the owner cannot recover on a policy to protect the goods. If a licence to export and deliver goods to an enemy's country be granted for a limited time, it is not sufficient that the goods were shipped before the expiration of the time, the ship not sailing till afterwards.

same

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same in the said vessel, being neutral, from *London to Calais or elsewhere*, as circumstances might require, for the use of any persons for whom the same were prohibited by the stat. 34 Geo. 3. c. 9. to be sent without such licence. With a proviso, that nothing therein contained should extend to affect the provisions in any act of parliament, except the said act; or to licence any act to be done further or otherwise than by the said act the king was authorized to licence. Provided also, that if any question should arise whether any thing done was authorized by that order, proof that such thing was done under the circumstances, and according to the terms and conditions therein expressed, should be on the persons claiming the benefit thereof. Provided also, that the said licence should remain in force *for two months from the date, and no longer*. The plaintiffs, in consequence of this licence, shipped 30 hogsheds of tobacco on board the last mentioned ship, which formed part of the goods insured by one of the policies in question; and on the 23d of December 1797 entered the same at the custom house for *Calais*; and upon such entry the shipping clerk of the plaintiffs made the following oath: “*Edward Ray*, “for *Vandyck and Gevers*, maketh oath that the goods “mentioned in this certificate are now to be exported “to *Calais* on their own account. *E. Ray*.” The plaintiffs at the same time entered into a bond according to the provisions of the stat. 29 Geo. 3. c. 68. in the penal sum of 1520*l.* conditioned to land the tobacco at *Calais*, &c. The remainder of the goods insured by the policies in question were afterwards shipped by the plaintiffs for *Rotterdam*, under an order of council of 10th January 1798 (after mentioned). On the 7th of April 1798 the

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captain of the *Juffrow Lydia* cleared out his ship at the custom house in *London* for *Calais*, *Rotterdam*, and *Embsden*, having made oath to the truth of the clearance in the usual form; and on the 14th of the same month sailed from *London* direct for *Rotterdam*. The *Juffrow Lydia*, when she so sailed from *London*, had on board the said 42 boxes and 11 casks of sugar, the said quantities of coffee, and the said 30 casks or hogheads of tobacco; and the *Vlerland* the 137 boxes of sugar; all on account of the plaintiffs. The *Vlerland* arrived safe at *Rotterdam*; but the *Lydia* with the sugar, coffee, and tobacco on board, having arrived off the mouth of the *Maese*, and having come to an anchor there, was captured by a *French* privateer and carried into *Ostend*; whereby the 42 boxes of sugar insured by the first mentioned policy, and the 11 casks of sugar, valued at 330*l.* the coffee, valued at 3735*l.*, and the 30 hogheads of tobacco, valued at 1380*l.*, insured by the other policy, were respectively wholly lost to the plaintiffs. By an order of council, dated 3d *September* 1796, reciting that an act passed in the 33 *Geo. 3.* (c. 27.) intituled "An act more effectually to prevent during the present war between *G. B.* and *France* all traitorous correspondence with the enemy," &c. And another act passed in the 34 *Geo. 3.* (c. 9.) intituled "An act for preventing money or effects in the hands of his majesty's subjects, belonging to or disposible by persons resident in *France*, being applied to the use of the persons exercising the powers of government in *France*, and for preserving the property thereof for the benefit of the individual owners thereof." And that another act passed in the 34 *Geo. 3.* (c. 79.) intituled "An act for more effectually preserving money and effects in

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"the hands of his majesty's subjects, belonging to or
 "disposable by persons resident in *France* for the benefit
 "of the individual owners thereof." And that it was
 expedient that such licence and authority should be
 granted as was thereafter granted; his majesty, &c.
 granted licence, according to the authority given by the
 said acts, to all persons residing in *G. Br.* either on the
 account or credit of themselves, or of any other person
 whomsoever, or wheresoever resident and being, to sell,
 supply, deliver, or send for such purpose, &c. or to aid or
 assist in so selling, supplying, delivering, or sending, &c.
 any goods or effects mentioned in the said acts (or any
 other goods or effects except such as are thereafter
 mentioned) to or for the use of any persons residing in
 the territories of the *United Provinces*, or in the *Austrian*
Netherlands, or in any part of *Italy*, or for the purpose
 of being sent into any part or place within the same
 respectively. *Provided*, that all such goods, &c.
 be exported from this kingdom in ships and vessels
 belonging to persons of some state or country in amity
 with his majesty; and that such exportation be made
under the usual conditions and regulations; and that such
 security be given *by bond*, in such penalty, by such per-
 sons, and in such manner, as shall be directed by the
 commissioners of his majesty's customs, that the said goods,
 &c. shall be exported to the places proposed and to
 none other, and that a *certificate* shall be produced within
 six months from the date of the bond, under the hand
 of the *British* consul or vice-consul (or two *British* mer-
 chants, &c.) residing at the place at which such goods,
 &c. shall be landed; testifying that the said goods have
 been all duly landed at that place. *Provided also*, that
 nothing therein contained should be construed to licence
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the exportation, &c. of any arms, or naval or military stores, &c. or any articles which are especially prohibited by any act of parliament, other than the acts before mentioned to be exported, &c. or in any manner to affect the provisions of any other act of parliament; or to ~~license~~ or authorize the several acts, matters, and things aforesaid, further or otherwise than as the same might be affected by the several before mentioned acts of parliament. Provided also, that every person who should take the benefit of that licence, should take it upon condition, that if any question should arise, whether the thing done were authorized by the licence thereby given; the proof that such thing was done under the circumstances, and according to the terms and conditions of that order, should lie on the persons claiming the benefit thereof. And that licence was directed to remain in force until the 25th of *December* then next ensuing, &c. The above order of council was by several other orders, particularly by one of the 10th of *January* 1798, further continued to the 25th of *June* 1798, which was subsequent to the loss in question. The question for the opinion of the court was, Whether the plaintiffs were entitled to recover.

This case was first argued in *Michaelmas* term last by *Giles* for the plaintiffs, and *Carr* for the defendant, and again in *Hilary* term by *Gibbs* for the plaintiffs, and *Rous* for the defendant.

The objections made on the part of the defendant were, first, (which went to the whole cause of action,) that the shipment of the goods for *Rotterdam* was illegal at common law, as being a trading with an enemy, and

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consequently could not be protected by an insurance; according to *Potts v. Bell* (a), and the case of the ship *Hoop* (b); which latter case also shews, that the circumstance of the goods being shipped on board a neutral vessel makes no difference; and that such trading was not legalized by the order of the king in council of the 3d of September 1796, continued by that of the 10th of January 1798. The original order refers to three recent acts of parliament, the 33 Geo. 3. c. 27., 34 Geo. 3. c. 9., and 34 Geo. 3. c. 79., the operation of which it suspends in favour of the plaintiffs. The only effect of it, therefore, was to license the trading so far as it had been specially prohibited under certain penalties by those particular statutes, leaving the question as it was at common law, or regulated by any other statutes: and indeed the order itself specially provides, that it shall not affect the provisions of any other than those acts of parliament. But supposing the licence to operate also upon the common law, it was done away by the subsequent stat. of the 38 Geo. 3. c. 28. by which the prohibitions of the former acts against such trading were extended to the *United Provinces*, and all intercourse with them was expressly prohibited. That act took effect on the 12th April 1798, after which, namely, on the 14th, the ship sailed from *London* for *Rotterdam*. And though there is a saving clause (*s. 5.*) as to acts which *shall be* done under the king's licence; yet the operation of it is prospective as to licences afterwards to be granted, and cannot warrant a licence granted before, which had not been carried into execution; in the same manner as a similar clause in the former acts had necessarily only a

(a) 8 Term Rep. 549.

(b) Rob. Adm. Rep. 196.

prospective operation. At all events, however, if the former licence continued in force subsequent to the last mentioned act, the plaintiffs cannot avail themselves of it without shewing that they have complied with all the terms and conditions of it. This is not only required by the licence itself, but enforced by the stat. 34 Geo. 3. c. 79. *f.* 30. Now the order of council stipulates that the goods shall be exported *under the usual conditions and regulations*; one of which is, (as required by the stat. 13 & 14 Car. 2. c. 11. *f.* 3.) that the goods shall be entered for the real place of destination: but that has not been complied with here. Such a regulation is peculiarly necessary to be observed, because it furnishes the means of providing for the observance of another condition mentioned in the order of council, namely, that the shippers shall give bond to export the goods to the place proposed, and to none other; a compliance with which is required to be proved by a certain certificate from such place. But no such bond was given in this instance, the proof of which lay upon the plaintiffs; and without it the goods were liable to seizure and confiscation. If, then, the shippers of goods do or omit an act which would give rise to a rightful detention or confiscation, they cannot recover upon a policy of insurance to protect the property so illegally exported. Secondly, (which relates only to the tobacco,) the stat. 29 Geo. 3. c. 68. for raising a duty on tobacco, and preventing evasions of it, in addition to the requisition of the stat. 13 & 14 Car. 2. abovementioned, requires (*f.* 40.) that a bond shall be given by the shipper for the actual exportation of the article to the place specified in the bond; "and that such tobacco shall not be exported to any other place or country whatever," &c. and *f.* 49. provides a particu-

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lar method for the discharge of bonds so taken, by a certain certificate of the compliance with that requisition. By the first mentioned clause the legislature meant to interdict the exportation altogether unless such condition were complied with, and not merely to sanction it upon terms. Here then the shipment was declared to be for *Calais*, and a bond given accordingly; notwithstanding which the ship afterwards cleared out and sailed for *Rotterdam*. But if this were permitted all the precautions in the act would be liable to be defeated; because it could not be known whether the conditions of the bond had been complied with, or whether the goods had not been relanded again in *England* with a view to defraud the revenue. The documents therefore obtained were false, which are worse than none. And it was settled in *Farmer v. Legg* (a), that if a ship be not properly documented the owner cannot recover upon an insurance against the loss of it. It is true that this is a mere revenue law; and it has been said (b) that we are not bound to regard the revenue laws of another state: but that implies that we are bound to regard our own, and an act done in contravention of them is illegal, and has been holden to avoid an insurance; *Johnson v. Sutton* (c), and *Dalmada v. Motteux* (d); and is cause of seizure, 2 *Roll. Rep.* 79. No advantage can be taken of the licence to ship to *Calais* or *elsewhere*, because that had expired in point of time long before the ship cleared out.

For the plaintiffs it was answered, as to the general question, that it could not be doubted but that the king's licence extended to legalize the trading as well at common

(a) 7 *Term Rep.* 186.(b) *Phenak v. Fletcher*, Doug. 250.(c) *Id.* 254.(d) *Park's Insur.* 266. 1st edit.

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law as under the recited acts. The king had power at common law to legalize such a trade, and those acts continue to him the same power notwithstanding their prohibitory provisions: the licence therefore operated under the acts with a special reference to each of them in the nature of a statute non obstante, and it was also valid as at common law without any special reference, by licensing the trade itself. The statute 38 Geo. 3. c. 28. does not vary the question, for the 5th section saves the king's prerogative in this respect in the same general terms that the former acts had done. The only objection then is, that a mere custom-house regulation has not been complied with, namely, the giving the bond for the exportation of the goods to the place proposed. The omission of that might perhaps have been ground of detention till it were complied with, and a good cause of refusing a clearance; but the consequence cannot be carried further, so as to make the insurance illegal. There is a great difference between performing an illegal voyage, and performing a legal voyage irregularly. In *Planché v. Fletcher* (a), even the circumstance of clearing out for another port than that to which the ship was really bound was holden not to make the voyage illegal or vacate the insurance. It is often done in time of war to deceive the enemy's cruisers. And it is no answer to say that the rule there laid down only applies to attempts to evade foreign revenue laws; for there, as here, the clearance was from the port of London for a foreign port. Besides, another object there was to evade the light-house duties; yet Lord Mansfield said that the ship was not liable to confiscation, nor the insurance void on that account. The

(a) *Planché v. Fletcher*, Dougl. 250.

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The insurance is only void where the trade itself is made illegal, or the risk is increased for want of certain ship's documents. In *Farmer v. Legg* (a) the question was, Whether the captain of the ship were properly qualified under the act of the 31 Geo. 3. c. 54. requiring him to have previously served a certain time in the *African* trade; and he was subjected to a penalty in case he was not so qualified: but the Court did not hold the insurance void for the want of the certificate of such qualification, but on the ground of a breach of implied warranty by the owner, in not having employed a commander of such competent skill and experience as the legislature had deemed necessary in that trade. In *Johnson v. Sutton* (b) the trading itself was made illegal, and as to half the cargo there was no licence. The case of *Dalmada v. Motteux* (c) turned on a breach of embargo, which is a temporary prohibition of the voyage itself, and subjected the ship to confiscation. In this case the trade itself was legalized by the licence, and the want of a mere custom-house document, which is not one of the ship's papers, but deposited with the custom-house officer, cannot vary the question between the assurer and assured. The only effect of it was that till the bond was entered into the custom-house officers might have refused to let the ship clear out; but that being waved on the part of the crown, no objection can now be made by the defendant, and the Court will presume that every thing was regularly done to obtain such clearance. Secondly, with regard to the tobacco, that was also protected by a particular licence. It is sufficient that it was shipped within the time limited by the licence, though the ship did not clear out nor sail

(a) 7 Term Rep. 186.

(b) Dougl. 254.

(c) Park's Inf. 266.

till afterwards. In this case the bond required was given to export the tobacco to *Calais*, and the licence was to go to *Calais* or *elsewhere*. It was not necessary for the ship to proceed direct for *Calais*, but she might have proceeded there after having touched at *Rotterdam*. Between the time of giving the bond and the actual sailing of the vessel circumstances might intervene to prevent the direct voyage from being pursued. But supposing the intention of going to *Calais* was altogether dropped, the only effect is that the bond would be forfeited; but no forfeiture of the goods would be thereby incurred. Much of the general reasoning before urged as to the distinction between custom-house and ship documents applies also to the tobacco act. And it is also a circumstance of great weight in this case that no fraud was intended, which might otherwise have vitiated the whole transaction, and perhaps made the trading itself illegal, as done in contravention of the law and the orders of council. But here the true destination of the ship was disclosed, and the custom-house clearance obtained with full knowledge by the officers of all the circumstances.

The Court took time to consider the case; and on the last day of the term

Lord KENYON C. J. delivered their unanimous opinion shortly to this effect. After stating the facts of the case: The plaintiffs obtained the order of council of the 30th of *December* 1797 for the purpose of shipping the tobacco and other goods therein mentioned for *Calais*. But that licence will not affect the decision in this case; because it was confined to the sending, supplying, and delivering

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in the *Lydia* the goods specified within two months (that is from the 20th of *December* 1797), and the ship did not sail till the 7th of *April* 1798. Therefore, whatever might have been the intention of proceeding to *Calais* after going to *Rotterdam*, the licence having expired before the voyage commenced, the exportation of the goods could not be protected by it. In this view of the case it becomes unnecessary for us to give any opinion upon the operation of the tobacco act. The question is then narrowed to the construction of the order of council of the 3d of *September* 1796, continued beyond the period in question by the order of the 10th of *January* 1798. But first I would observe that it is settled, and not to be doubted, that trading with an enemy's country is illegal, and that no voyage of that kind can be insured, unless legalized by the licence of the king. But though the king may at common law license such a trading generally, yet he may also qualify his licence, in which case the party seeking to protect himself under such licence must conform to the requisitions of it. Now the order of council of the 3d of *September* licensing the trading to the *United Provinces* is on this express condition, that bond be given in such penalty by such persons, and in such manner, as the commissioners of the customs shall direct, that the goods shall be exported to the places proposed and to no other; and that a certificate shall be produced within six months from the *British* consul or other person there described that the goods have been landed; which condition has not been complied with, as it is not found in the case that any such bond was given. The plaintiffs therefore cannot protect themselves by that licence, and conse-

quently the voyage was illegal, and cannot be insured.

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Postea to the Defendant (a).

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(a) A similar determination was made in the case of *Vanharthals v. Halbed*, *M. 31 Geo. 3. B. R.* One of the questions there turned on the stat. 16 Geo. 3. c. 5. which prohibited intercourse with the American Provinces then in rebellion; in which there was a clause enabling the British commanders on that station to grant licences to carry provisions, &c. to places occupied by the British. And in an action against the underwriter on a policy on goods to one of the prohibited places within the act, the plaintiff relied on a licence given by one of our commanders; but as that licence did not follow the requisitions of the act, in not stating the *quantity* of provisions, &c. the Court, upon a motion for a new trial, held that the licence was void, and consequently the voyage being illegal was not the subject of insurance; and finally a nonsuit was entered.

The Bishop of LONDON against FFYTCHÉ
In Error (a).

(B. R. Mich. 23 Geo. 3.)

THIS was a writ of error from the court of Common Pleas in an action of quare impedit, in which the defendant in error by his declaration stated, that one

Thomas

presented because he had given a general bond to resign upon the request of his judgment was reversed in Dom. Proc.

Held by B. R. that the ordinary of the diocese may not refuse to admit a clerk to a rectory to which he was patron: but this

(a) This being a case of great importance, and to which frequent reference is made, and the grounds of the decision having been adverted to in the case of *Eggh v. Letwicks*, determined in the course of this term; I thought that the following note of it, which has been most obligingly communicated to me, would not be unacceptable to the profession; as I am not aware that there is any note in print of what passed in this court. The value of the original has been increased by having been compared with, and some additions made to it, from the MS. of the late Mr. Justice Buller, with which I have been also favoured. The latter MS. includes all the subsequent proceedings in the

House

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The Bishop of
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appearing
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In Error.

Thomas Ffytche deceased was seised of the advowson of the church of *Woodham Walter* in *Essex* in gross by itself, as of fee and right, and being so seised, on the 24th of *April* 1769 presented to the said church, then being vacant, *Foots Gower*, Clerk, who on that presentation was admitted, instituted, and inducted into the same; and that the said *T. Ffytche*, on the 10th of *February* 1777 died seised in his said estate in the said advowson, upon whose death it descended to *Elizabeth Ffytche*, then and still the wife of the defendant in error, and daughter and only child of *William Ffytche* deceased, the brother of the said *T. Ffytche*, as niece and heir at law of the said *T. Ffytche*; whereby the defendant in error and *Elizabeth* his wife, in her right, became seised of the advowson of the said church in gross; and being so seised, on the 26th of *May* 1780 the said church became vacant by the death of the said *F. Gower*, and is yet vacant; by reason whereof it belongs to the defendant in error, in right of his wife, to present a fit person to the said church; yet the plaintiff in error, the bishop of *London*, hinders him from presenting, &c. to his damage, &c. To this declaration the bishop pleaded, 1st, That the said church of *W. W.* is within his diocese of *London*, and a benefice with cure of souls; and that the said church having so become vacant by the death of *F. G.* as aforesaid, afterwards, and whilst the same continued vacant, and before the making of the

House of Lords, and was intended to have been added in this place, but upon comparing it with Mr. Cunningham's report of the same case (in the House of Lords) in his *Law of Simony*; I found that report so full and accurate in general, that it was altogether unnecessary for the sake of a few alterations, mostly verbal ones, to give a very long report of a case of which the profession was already in possession.

presentation

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London
against
FRYTON:
In Error.

presentation after mentioned, to wit, on, &c. at, &c. it was corruptly, simoniacally, and unlawfully, and against the form of the statute agreed between the defendant in error and one *John Eyre*, that he the defendant in error should present the said *J. E.* his clerk, &c. and that the said *J. E.* should in consideration thereof, give his bond to the defendant in error in the penal sum of 3000 *l.*, conditioned at any time then after his admission, &c. upon the request of the said defendant, his heirs, &c. absolutely to resign the said rectory, &c. so that the same might thereby become vacant, and the defendant in error, his heirs, &c. be at liberty to present anew thereto. That the defendant in error afterwards, in pursuance of the said agreement, corruptly, simoniacally, and unlawfully, and against the statute, &c. presented the said *J. E.* his clerk to the said bishop to be admitted, &c. and the said *J. Eyre* did also, in pursuance of that agreement, afterwards corruptly, simoniacally, and unlawfully, and against the statute, &c. give such bond as aforesaid, which the defendant in error corruptly, simoniacally, unlawfully, and against the statute, &c. accepted from the said *J. E.*; by means of which said premises, and by force of the statute, the said presentation of the said *J. E.* by the defendant so made as aforesaid became void in law; and the plaintiff in error by reason thereof did not, nor could, admit, &c. the said *John Eyre* into the said church by virtue of that presentation. Secondly, he pleads that the said church is a benefice with the cure of souls; and the same having so become vacant by the death of *F. G.* as aforesaid, afterwards, and whilst the same was so vacant, to wit, on, &c. it was, for the purpose of investing the defendant in error with an undue influence, power, and control

with

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against
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with the said *J. E.* as rector of the said rectory, &c. in case he should, upon such presentation as after mentioned, be admitted, &c. agreed between the defendant in error and the said *J. E.*, that he the defendant should present the said *J. E.* his clerk to that church being so vacant as aforesaid, and that the said *J. E.* should, in consideration of such presentation, give such bond conditioned as aforesaid (in the manner before stated). That the defendant in error afterwards, in pursuance of that agreement, presented the said *J. E.* his clerk to the said bishop to be admitted, &c. and the said *J. E.* afterwards gave such bond, &c. with such condition, &c. which the defendant in error accepted from the said *J. E.* That upon such presentation of the said *J. E.* to him the plaintiff in error for the purpose aforesaid made, the plaintiff, as ordinary of the said church, duly inquired concerning the fitness of the said *J. E.* to be by him admitted, &c. and discovered that the said *J. E.* had given such bond, &c. with such condition, &c. and that by means thereof the defendant in error would have acquired and had an undue influence, power, and control over the said *J. E.* as rector, &c. if the plaintiff in error had upon such presentation admitted, &c. the said *John Eyre*, &c. by reason of which premises the said *J. E.* became and was an unfit person to be by the plaintiff in error admitted, &c. by virtue of that presentation. Wherefore the said bishop, as ordinary, &c. refused to admit, &c. the said *J. E.* into the said church so being vacant as aforesaid. To the first plea the defendant in error demurred generally; and also demurred to the second plea, and assigned for causes of demurrer to that plea, that there is no specification of the undue influence or power or control mentioned in that

that plea, with which the defendant in error was purposed to be invested over the said *John Eyre* as rector of the said rectory, to which the said defendant in error could give any answer, or upon which a proper issue could be joined to be tried by a jury. And also that it is not in that plea alleged, how and in what manner the said *John Eyre* was or did become a person unfit to be admitted, instituted, and inducted into the said rectory and parish church, so that any issue could be taken upon such allegation of his unfitness. The bishop joined in demurrer. In *Hilary* term 1782 the court of Common Pleas gave judgment for the defendant in error upon both pleas. Upon this judgment the bishop brought a writ of error in the court of King's Bench, and assigned the common errors. In *Michaelmas* term 1782 the case was argued by *Adam* for the plaintiff in error, and by *Lee* for the defendant.

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 The Bishop of
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 against
 FRYCHA
 In Error

For the plaintiff in error it was contended, that there was a distinction between this case and those which had been before the court on questions of simony; as those were between the obligor and obligee; but here the question was, Whether the bishop were bound to admit upon such a presentation? *Lyndw.* 107. 281. proves that such bonds are unlawful. *Pascall v. Clark*, Noy. 22. They might be made the price of the living by the parson's refusing to resign; which was simony. That for compelling residence and other good purposes the law had provided suitable remedies: this therefore must be meant for bad purposes. *Swaine v. Carter*, Comb. 394. *Grabme v. Grabme*, 1 Vern. 131. That such a bond destroyed the canonical obedience of the clerk. That it turned an office for life into an office at will, which could not be done.

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done. 4 *Inst.* 75. 87. 146. 3 *Burn Ecc. L.* 299. &c.
4 *Com. Dig.* tit. *Officer*, 239. That such bonds would
be bad if taken from other officers who had life estates,
such as judges, masters in Chancery, &c. That this
was simony by the canon law, which the court were
bound to take notice of in this case without pleading it,
it having been adopted with regard to institution by the
statute of *Articuli Cleri. c. 13.*

For the defendant in error, the case of *Hesketh v. Gray (a)*, which was in this court in 1755, was relied on, as being in point: and that the only thing the defendant's counsel there attempted to shew was, that as the defendant could not resign for want of the bishop's acceptance, the penalty was not forfeited; but the Court held otherwise. That in *Peele v. Earl of Carlisle*, 1 *Str.* 227. the point was holden too clear for argument, that such bonds were valid (b). That if the bond were void, there was no reason for the bishop not admitting; but if it were not void, his plea was, that "because the clerk had entered into a legal bond he would not admit him:" and therefore there was nothing in the distinction attempted between this case and that of the obligee. That the second plea was bad, as no issue could be taken on undue influence, as alledged in the plea.

Lord MANSFIELD C. J. The general question before the Court upon these pleadings is the validity of such a bond: for as to the allegation, that it tended to procure an undue influence, it is certainly too general: the undue

(a) *H. 28 Geo. 2. 3 Burn's Ecc. L. 332. tit. Simony.*

(b) *Vide Johns v. Lawrence, Cro. Jac. 248. Babington v. Wood, Cro. Car. 130. Baker v. Watson, 2 Kcb. 446.*

influence ought to have been specified. I think it right to declare my assent to the opinion given by the Court of Common Pleas, of which I have seen a very full note, namely, that if any undue motive appeared in giving the bond, it would avoid it at law, as well as lay a foundation in a court of equity for an injunction. And I should also be of opinion, that if after the execution of the bond an undue use were attempted to be made of it; such as a demand of money, a claim of tithe, or for any other illegal purpose, the use actually made of it should be considered as actual evidence of the purpose for which it was given, and might be made use of in any court of law upon plea. Another circumstance mentioned in the argument is out of the case, which is, that it is simony by the canon law; for if the canon law had been pleaded ever so particularly, it would not have varied the case; for the canon law is more general than the statute. It then comes to this naked question, Is such a bond good since the statute 31 *Eliz. c. 6.* by the law of *England*; or is it an innocent bond on the face of it? As to that point, in the time of *Eliz.* and in the time of *Jac. 1.* such a bond was holden to be legal, and so fully established, that in 1698 Bishop *Stillingfleet* wrote a most elaborate discourse against the decisions of the courts of common law, taking it to be fully established, but yet erroneously so. But notwithstanding the great abilities of that prelate, (and if the matter were entire there is great ingenuity in that discourse,) all the courts of *Westminster-Hall* have uniformly holden it to be a lawful bond; and to such a degree, that in some of the last cases the Court would not suffer the point to be argued. I should have been very sorry to have followed that example in this case; because it would have deprived us of

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the pleasure of hearing both the gentlemen; but after having heard them, I think it is not permitted to us to go into the question: and if all the authorities be wrong I am bound: I do not think it decent to go into them. And therefore upon the current of authorities, which have expressly decided the point, I think it too clear to be argued.

WILLES J. concurred.

ASHHURST J. I am of the same opinion. The whole tenor of the cases is so strong, that the question is established beyond controversy. I think the different form in which this case comes makes no difference; for what is the reason assigned by the bishop for refusing to receive the presentation? It is no more than this, because the clerk has given a bond, which the courts of law have holden to be legal.

BULLER J. Nothing but the number of positive authorities would induce me to concur in the opinion of the Court. I cannot help thinking there was a great deal of good sense in the opinion of Mr. Justice *Powell* (a), and I think with him, that if the judges in ancient times had seen the inconveniences that have since ensued from the use of these bonds, they would not have pronounced upon them as they did. The argument would afford a great deal of discussion. The request may be for a lawful purpose, therefore the condition shall be good. If so, why not state what that purpose is? The argument seems to me equally strong, (and that part of *Stillingfleet's* book

(a) This referred to a MS. note of that Judge's opinion.

does not admit of an answer), that it may be used for a bad purpose; why not therefore bad? But upon the principles of pleading it seems a great stretch to say that it shall be taken to be confined to lawful purposes only: for the bond is to resign on request, that is, on all requests. If then the bond be to resign on all requests, can any thing be introduced on the record different from the condition? This is the way in which I should have reasoned: But so strong and so uniform a train of decisions leave no room for the Court to exercise their judgment on the reasons on which they were founded. For arguments founded on a possibility of abuse or inconvenience are not to be adopted in contradiction to what has been established as law for a century and a half past by such a variety of determinations. The rule *stare decisis* is one of the most sacred in the law: but if not adhered to in such a case as this, it would be very difficult to say that it ought to weigh in any. If the law be thought to be improper or inconvenient, application to correct it must be made elsewhere, and not to those who are bound by the repeated and solemn judgments of their predecessors (a). As to the last plea, a reason has been given at the bar, which is decisive against it: it was said that undue influ-

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(a) Mr. Justice *Buller* delivered an opinion to the same purpose afterwards in the House of Lords. Speaking of the cases which had been decided, he said, "I have taken no small pains to find out on what principle those decisions were founded; but without much effect: for after all the labour I have bestowed upon the subject, it does seem to me that they are destitute of all sense, reason, or principle. But still they are so numerous, they have arisen at so many different periods, all the judges for near two hundred years past have been so uniformly of the same opinion, the law has been received not only in Westminster Hall but through the whole kingdom as so firmly settled, and mankind have so universally acted upon that idea, that I think it would be very dangerous to overturn or even to shake it," &c.

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ence could not be defined: if it cannot be defined, it cannot be tried: it is only a consequence, and therefore cannot be traversed. Then it brings the case back to the first plea.

Lord MANSFIELD added, I forgot to make one more observation: a distinction has been made where the action is between the obligor and obligee, and this case; but there is no ground for the distinction. For in the action as between obligor and obligee, if the bond were illegal, the obligor could not recover; for no man who comes on an illegal ground can ever recover. Therefore it is a solemn determination that the bond is legal.

Judgment affirmed.

Upon this judgment a writ of error was brought in parliament: and after hearing counsel fully at the bar, the judgment of this Court was upon the motion of Lord *Thurlow* C. reversed. The division being 19 against 18 Lords.

REGULA GENERALIS,

Easter 41 Geo. III.

Disposal of causes
 in the Peremp-
 tory Paper.

IT IS ORDERED, That no Rules in causes entered in the Peremptory Paper be enlarged during the term, or put off from the appointed day, by consent of counsel, or the attornies concerned therein, without previous application to and special leave of the Court.

C A S E S

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Forty-first Year of the Reign of GEORGE III.

1801.

ANDERSON, Administrator, &c. against MARTINDALE.

Tuesday,
June 9th.

IN covenant by the plaintiff as administrator of *John Anderson* deceased, the declaration which was entitled of *Michaelmas* term generally stated, that by indenture of four parts made the 16th of *September* 1789, between *Elizabeth Wyatt*, *John Anderson*, (the intestate,) *R. Mackreth*, and *J. Martindale*, (the defendant,) it was witnessed, that for the considerations therein mentioned *R. Mackreth* for himself, his heirs, executors, &c. and the defendant as his surety, &c. did, and each of them did jointly and severally covenant to and with the said *J. A.* deceased, in his lifetime, *his executors, administrators, and assigns, and also to and with the said E. Wyatt and her assigns*, that he *Mackreth*, his executors, &c. should pay to the said *J. A.*

A covenant to and with *A.*, his executors, administrators, and assigns, and to and with *B.* and her assigns, to pay an annuity to *A.* his executors, &c. during *B.*'s life, is a joint covenant to *A.* and *B.* in which they have a joint legal interest, although the benefit be for *A.* only; and therefore on the death of *A.* the right of action survives to *B.*, and *A.*'s administrator cannot sue on the covenant.

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his executors, administrators, or assigns 60*l.* per annum during the life of *E. Wyatt*. It then averred, that the intestate died the 21st of *May* 1799; after which, *viz. on the 7th of November* 1799, administration was granted to the plaintiff; and that *although E. Wyatt is still living*, yet that *R. Mackreth* has not paid to the deceased, nor since his death to the plaintiff as administrator, the said annuity, &c., but that eight quarters were in arrear in the lifetime of the intestate, &c., and after his death two quarters more, &c., and so alleges a breach by the defendant; and concludes in the usual form with a profert of the letters of administration, *the date whereof* is the same day and year in that behalf abovementioned. To which there was a general demurrer, and joinder.

Præd Serjt., in support of the demurrer, took two objections: 1. The declaration states that administration was granted to the plaintiff on the 7th of *November* 1799; and the declaration being intitled generally of *Michaelmas* term 40 *Geo. 3.* which refers to the first day of the term, it appears that the action was commenced before the plaintiff was qualified to sue. 2. The covenant being made with two covenantees jointly, who are to have the benefit of the same thing, namely, *J. Anderson* deceased, and *E. Wyatt*, who is stated in the declaration to be still living; the latter as survivor is alone entitled to maintain the action, and not the plaintiff as representative of the deceased covenantee. During the lives of *J. A.* and *E. W.* the covenant was joint for the performance of one and the same thing, *viz. the payment of the annuity to J. A.* during *E. W.*'s life: there was nothing else covenanted to be done for the benefit of *E. W.* alone: and therefore this is not like the cases where though the covenant be joint
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in words, yet if the interest be several the covenant shall in effect be taken to be several also; as where one covenants to *A.* and *B.* to do two things, one of them for the benefit of *A.*, and another for the benefit of *B.* Neither does it make any difference that the defendant covenants jointly and severally; for the interest being joint, the action must be of the same nature; and consequently, after the death of one of the covenantees, survives to the other, to avoid a multiplicity of actions for the same duty. And he cited *Slingby's case*, 5 Co. 18. b. 2 Leon. 47. 3 Leon. 160. and *Rolls v. Yate*, Yelv. 177. and 2 Brownl. 207. and *Bull. N. P.* 157, 8. as in point. And also referred to *Cabell v. Vaughan*, 1 Ventr. 34. cited and adopted in *Scott v. Godwin*, 1 Bos. & Pull. 67. to shew that advantage might be taken in this form of the defect of title appearing on the plaintiff's own shewing.

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Gibbs contra. As to the first objection; the death of the intestate on the 7th of November is laid under a videlicet, and therefore the plaintiff would not be bound by it on general demurrer. [Lord Kenyon observed, that the letters of administration must be taken to have existed at the time to which the declaration refers, because it contains a profert in curiam of them.] 2dly, The whole benefit and interest passed to the intestate alone, for the annuity was payable exclusively to him, therefore consistently with the cases cited he alone might have sued in his lifetime, and since his death his representative. This would be the case even if the covenant were taken to be joint as well as several; for the action follows the nature of the interest or benefit; and no interest or benefit passed to *E. W.* But here the covenant is several and not joint; the defendant covenants to and with *J. A.*, his execu-

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tors, &c., and also to and with *E. W.* and her assigns: this is a distinct covenant to each of them, and the variance in the expression shews that it was so intended. It was useless to covenant with the executors of *E. W.*, because the annuity was to cease on her death. It is true, that this construction makes the defendant liable to two actions; but that is his own fault, for binding himself to two persons for an act to be done only to one of them. If he had so bound himself to each by two different deeds, the covenantees could not have sued jointly; then it makes no difference if there be several covenants to several persons in the same deed. But if the covenant be several, though the interest were joint, the right of action must be several.

Lord KENYON C. J. There is no distinguishing *Slingby's* case from the present. There *Beckwith* by indenture covenanted, promised, and agreed to and with *William Vavasor* and *Francis Slingby*, and to and with *George Harvey* and *Frances* his wife, and their assigns, and to and with each of them (*qualibet et qualibet eorum*) that he *Beckwith* at the sealing and delivery of the indenture was lawfully and sole seised of a certain rectory. And in an action of covenant thereon by *Slingby* and his wife, the issue was found for the plaintiff, and judgment obtained thereon in *B. R.*: but on a writ of error brought in the Exchequer-chamber that judgment was on great deliberation reversed; because the other covenantees had not joined in the action with the plaintiffs; and they alone could not maintain the action, notwithstanding the words "*et ad et cum qualibet et qualibet eorum.*" And this distinction was taken, which appears to be very sensible, that where every of the covenantees is to have a several interest or estate, there the
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addition of the words "*cum quolibet eorum*" will make the covenant several, in respect of their several interests. As if one by indenture demise *Blackacre* to *A.* and *Whiteacre* to *B.* &c. and covenant with them *and each of them* that he is lawful owner of the said acres; there in respect of the several interests the covenant by those words is made several. But if he demise to them the acres jointly, then those words are void; for a man by his covenant cannot, unless in respect of several interests, make it first joint, and then several by those or the like words. The learned reporter then gives several other instances, all tending to the same conclusion. And the reason given is, that where the interest is joint, if several were to bring actions for one and the same cause, the court would be in doubt for which of them to give judgment. So here I should say, here is a covenant to two to pay an annuity to one of them; shall both bring actions for the same interest where only one duty is to be paid? Which of them ought to recover for the non-performance of the covenant? The defendant is only bound to pay the annuity once. This is different therefore from the case put by Lord *Coke*, where the covenant is to several for the performance of several duties to each; there the covenant shall be moulded according to the several interests of the parties, and each shall only recover for a breach so far as his own interest extends. It has been assumed in the argument for the plaintiff, that the covenantees had different interests, but that is not so; the covenant to both was for the same thing: and though the benefit were only to one of them, yet both had a legal interest in the performance of it; and therefore the legal interest being joint during the lives of both, on the death of one it survived to the other. If indeed the covenant had been to each by two different deeds, though for the same

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duty, there could not have been a joinder in action : but here the parties claim by the same title, and therefore the law coincides with the justice and convenience of the case. No difference can arise on the omission of the words *executors and administrators* in the covenant to *E. Wyatt* and her assigns, which words are added to the covenant to *J. Anderson* ; the legal effect is the same : for a covenant to one and her assigns extends equally to her executors and administrators.

Per Curiam,

Judgment for the Defendant.

Tuesday,
June 9th.

The Earl of DERBY against TAYLOR and another,
Executors of TWIST.

A grant by lease for lives of all their estate, right, title, interest, &c. in the premises to one and his executors, habendum to him and his executors for 99 years if the lives should so long live, in as large, ample, and beneficial way, &c. as the grantors, their heirs, &c. held, is no assignment of the freehold, and consequently not of the reversion interest of the grantors in their lease ; and therefore the reversioners (the lives being expired within the term) cannot maintain covenant against the under lessee for not delivering up the premises in good repair.

THIS was an action for a breach of covenant, wherein the declaration stated, that the late Earl of *Derby*, whose grandson and heir the plaintiff is, being seized in fee of a messuage and other premises therein described, by indenture dated 14th December 1756, made between the late earl of the one part, and *Thomas Taylor* of the other part, demised to *Taylor*, his heirs and assigns, the said premises, &c. for the lives of three persons therein named, all of whom are now dead. That *Taylor* covenanted for himself, his heirs and assigns, with the late earl, his heirs and assigns, to repair and keep in repair the premises demised during the said term, and at the end of the term to deliver them up so repaired to the late earl, his heirs and assigns. The declaration further stated the entry and seisin of *Taylor* the lessee, the death of the late earl, and the descent of the reversion to the plaintiff. And that afterwards all the estate, right, title and interest, property, claim and demand whatsoever, of *T. Taylor*, of and in the demised premises with the appurtenances

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ces came to and vested in *J. Twist* by assignment; by virtue whereof *Twist* entered into and became seised of the demised premises for the remainder of the term demised to *Taylor*. The declaration further stated the death of the three persons for whose lives the estate was demised; and averred that *Twist* suffered the premises to be out of repair, and that at the end of the term they were delivered up to the plaintiff without being repaired. The defendants pleaded several pleas, but the only material one was that which denied that all the estate, right, title and interest, property, claim and demand whatsoever of *T. Taylor*, of and in the demised premises, came to and vested in *J. Twist* by assignment thereof, in manner and form as alleged in the declaration.

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The cause came on to be tried at the last *Lancaster* assizes before *Graham B.* Upon the trial the said lease was produced, which contained a proviso for re-entry if the lessee, his heirs or assigns, should demise, grant, assign, set over, or exchange the premises, or any part thereof, to or with any person or persons, other than to or for his wife and children or some of them, and that for some number of years, determinable upon the said lives, for which the premises were demised as aforesaid, or the survivor of them, without the licence of the said earl, his heirs or assigns, first obtained in writing under his or their hands. Upon the trial all the allegations contained in the declaration were admitted to be true, except that which alleged that *Twist* became assignee of all the estate, right, title, interest, property, claim, and demand whatsoever, of *T. Taylor*, of and in the demised premises. And a verdict was found for the plaintiff by consent upon all the issues, for nominal damages, to be ascertained by a

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referee if necessary ; subject to the opinion of this Court, whether by means of the indenture hereinafter stated and duly executed by the parties, and the enjoyment of the premises by *Twiss* during his life, he became assignee of the premises, so as to support the action. If the Court were of opinion the present action could not be supported, then judgment of nonsuit to be entered.

The indenture in question, dated 24th of *January*, 30 *Geo. 2.*, between *T. Taylor* and *T. Harrocks* of the one part, and *James Twiss* of the other part, witnessed that in consideration of 245 *l. Taylor* and *Harrocks* hath demised, granted, bargained, sold, assigned, transferred, and set over, and by these presents doth demise, &c. to *Twiss*, his executors, administrators, and assigns, all that messuage and tenement, &c. held by lease under *Edward Earl of Derby*, and now in possession of *Twiss*, his assignees, &c. and all the estate, right, title, interest, good-will, and tenant right, sole power of leasing or renewing leases of the said premises, property, benefit, advantage, claim, and demand whatsoever, both at law and in equity, of them the said *Taylor* and *Harrocks*, of, in, or to the same, every or any part or parcel thereof, to have and to hold the said messuage, tenement, &c. and all and singular other the premises abovementioned, and intended to be hereby assigned, with their appurtenances ; unto *Twiss*, his executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during, and unto the full end and term of ninety-nine years from thence next ensuing and following, and fully to be complete and ended, if *Harrocks*, *J. Twiss*, and *T. Twiss*, the three lives in the indenture of lease thereof named, or any of them should so long live : and that in as large, ample, and beneficial way, manner and form, to all intents, constructions and purposes, as they the said

T. Taylor

T. Taylor and *T. Harrocks*, their *heirs*, executors, or administrators, or any of them, can, may, might, or could have held and enjoyed the same if these presents had not been made; yielding and paying therefore yearly during the said term unto the lord and owner of the reversion and inheritance of the said hereby assigned premises the yearly rent of 5 s. 6 d., &c. Then followed the usual covenants for quiet enjoyment, for freedom from other incumbrances than the rent, and for further assurance; executed by the proper parties.

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Lambe for the plaintiff said, that after the cases of *Holford v. Hatch* (a), and *Palmer v. Edwards* (b), he must admit that the assignee was not liable in covenant unless the whole interest in the original lease passed to him: but he contended that the whole interest was assigned to the testator by the indenture, and that it was not merely an under lease. For nothing was reserved in the shape of rent or otherwise to the original lessee, but only to Lord *Derby*. There was no kind of tenure or holding between the assignors and assignee. As in *Poultney v. Holmes* (c), the original lessee parting with the term was holden no assignment, but only an under-lease, because he reserved rent to himself: So here the converse shews that it is an assignment. The whole deed purports to be an assignment; it is so expressed in several parts by the word *assign*. The words of grant are as extensive as possible, granting and assigning "all the estate, right, title interest," &c. of the original lessees in the premises; and though this is attempted to be restrained in the habendum, which is expressed to be for 99 years if the

(a) *Dougl.* 183.(b) *B. R. E.* 23 *Gr.* 3. cite *ib.* 187(c) 1 *Str.* 495.

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three lives mentioned, or any of them, should so long live; yet it is apparent that the intention of the parties was to assign the whole interest; for the assignee is to hold the premises "in as large, ample, and beneficial way," &c. as the assignors, their *heirs*, &c. might have done. But if the habendum be of less than the premises it is repugnant and void, and the words of grant must prevail. For the habendum may enlarge, but cannot abridge the premises (*a*), *Co. Lit.* 299. [Lord Kenyon C. J. How could this conveyance operate to pass the freehold without proper words for that purpose?] It may be presumed, if necessary, that livery of seisin was made.

LORD KENYON C. J. That is a fact which at any rate must be found by the jury. And I am not satisfied that there is any ground in this case upon which the jury could be directed so to find. The question at present before the Court is as to what estate passed to *Twiss* under the indenture? It cannot be said that a term of 99 years is co-extensive in law with an estate of freehold: and here are no words by which the freehold of which the original lessees were seised was conveyed to the defendant's testator. Then how can we say that the whole interest in the lease passed to him. The conveyance of all the grantor's "estate, right, title, interest," &c. to a man and his executors for years cannot convey a freehold. Such words mean no more than all their interest, &c. in the legal estate thereby granted; and we cannot give those words a larger operation than the parties themselves have declared they should have.

Per Curiam.

Positee to the Defendant (*b*).

Wood was to have argued for the defendants.

(*a*) That is where some certain estate is granted by the premises, with which the habendum is inconsistent. *Stukely v. Butler*, *Heb.* 170, 1.

(*b*) Vide *Smith v. Mapleback*, 1 *Term Rep.* 441.

1801.

WARD *against* FELTON.Tuesday,
June 9th.

THIS was an action of assumpsit to recover the freight and primage of 72 hogsheads of tobacco from *Norfolk in Virginia in America to Liverpool*. The defendant pleaded the general issue; and at the trial, at the Sittings after *Hilary* term last at *Guidhall* before Lord *Kenyon*, a verdict was found for the plaintiff for 476*l.* 5*s.* 7*d.* subject to the opinion of this Court on the following case. In *September* 1799 the ship *Friendship*, an *American* vessel, of which the plaintiff was captain, was bound on a voyage from *Norfolk in Virginia to Liverpool* as a general freight vessel, and was consigned by her owners to the house of Messrs. *Rathbone, Hughes, and Duncan* at *Liverpool* as their agents. *Edward and Thomas Downing* of *Philadelphia* loaded on board her 72 hogsheads of tobacco, and the plaintiff signed the following bill of lading; the words "Mr. *Geo. Felton*" therein being struck out, and the name "Mr. *Downing*" being substituted in its place, with the consent of the shippers and of the owners and captain of the vessel: "Shipped, &c. by *E. and T. Downing* of *Petersburg in Virginia*, in the ship *Friendship*, *W. Ward* master, and now lying in *Norfolk harbour*, and bound to *Liverpool*, viz. 72 hogsheads of tobacco, to be delivered, &c. at the said port of *Liverpool*, (the damages of the seas only excepted,) unto Mr. *Downing* or to his assigns, he or they paying freight for the said goods six guineas per hoghead, with 5 per cent. primage. In witness, &c. Dated *Norfolk*, 25th *September* 1799." Indorsed, "The alteration in this bill of lading, substituting Mr. *Downing's* name in lieu of Mr. *Felton's*, made with consent of the parties."

A. and B, merchants abroad, ship tobacco for *Liverpool*, consigned to *A.* himself there, to whose order the bills of lading are made. One of these bills is sent inclosed in a letter from the shippers to *C.* at *Liverpool* advising him of such consignment to *A.*, and that *A.* intended to proceed to *Liverpool*, but in case he should not arrive in time desiring *C.* to do the best for them. The tobacco having arrived in a damaged state before *A.* is required to be landed, and is deposited in the king's warehouse pursuant to the statute; and afterwards *C.* acting as agent for *A.*, within the knowledge of the captain, makes an entry of it in his own name in the custom-house to avoid seizure. Held that this was not such an acceptance of the cargo by *C.* as would make him liable to the captain for the freight.

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The bill of lading had no indorsement except the memorandum above copied. The vessel arrived safely off and near *Liverpool*, and took on board a pilot, but by bad weather was without any fault of the crew driven on shore and considerably injured; and was in further danger, when the plaintiff applied to *Rathbone* and Co. his consignees, who addressed notes to several of the consignees of goods on board her, to meet and consult what should be done; amongst others to the defendant, whose name appeared legible on the bill of lading as before stated; and they severally attended the meeting, the defendant remarking that *Downing* and Co. were correspondents of his. At such meeting, it was resolved by the consignees of the other part of the cargo, that *Rathbone, H., and D.* should take every precaution to save the cargo; and the defendant observed, that he did not know whether there were any goods on board consigned to him, but if there were, he agreed to the same measures. Proper means were taken by *Rathbone* and Co. to save the cargo. A day or two after the meeting the defendant received an invoice of the 72 hogheads of tobacco, and a letter from *E. and T. Downing*, containing a bill of lading similar to that before stated, except only that the name, "Mr. Geo. Felton," was not at all inserted in it, but the name of Mr. *Downing* only. This letter, dated *Petersburg, September 25th 1799*, stated that the tobacco was consigned to their *E. Downing*, who intended soon to proceed to *Liverpool*, and directed an insurance on it at 40*l.* per hoghead. That in case any accident happened to *E. D.* on his passage, and that he should not arrive in time to see to the sale of the tobacco, they hoped the defendant would do the best for them. This was the first transaction, but not the first correspondence between Messrs.

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Downings and the defendant. Afterwards, on the 18th of *November* 1799, Mr. *Downing* not being arrived at *Liverpool*, the defendant made the following entry of the tobacco in the custom house, as is usually done, and as is by law required to be done before tobacco can be landed. "In the *Friendship*, *Virginia*, G. Felton, 72 hogsheds, "105,881 lbs. tobacco, *American* produce, to be warehoused per *November* 19th 1799." The tobacco in question was landed from the ship on the quays at *Liverpool* by means of lighters, on the 23d, 25th, 26th, 27th, and 28th of *November* 1799, and was duly taken by the proper officers of the customs to the king's warehouse (as is the usual mode of landing tobacco at that port); but owing to the storm, and getting it on shore, some part was lost, and the rest so damaged, that only 30 out of 45 hogsheds landed in hogsheds were serviceable; and the other 15 hogsheds, and also the remainder which was landed in bulk were duly condemned as unserviceable, and were burnt at the king's pipe. On the 3d of *December*, after the arrival of *E. Downing* at *Liverpool*, the freight was demanded of the defendant, who refused to pay it, alleging the arrival of *E. Downing*, and that he had nothing to do with the tobacco. The 30 serviceable hogsheds were only of the value of about 5*l.* per hogshed, without any allowance for their freight. The question for the opinion of this Court was, Whether the plaintiff were entitled to recover all or any, and what portion of the freight and primage of the tobacco from the defendant?

Scarlett for the plaintiff contended, 1st, that freight was due notwithstanding the deteriorated condition of the goods, owing to the perils of the sea. *Luke v. Lyde*,

2 *Burr.*

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2 *Burr.* 882. and 1 *Blackst. R.* 190., and *Lutwidge and How v. Grey*, *Dom. Proc.* 1738, there cited. In the former case Lord *Mansfield* said, "it is nothing to the master whether the goods saved are damaged or otherwise; for an average freight is due on the whole: and the merchant cannot pick and chuse, but must take to the whole if he take to any." So *Molloy*, b. 2. c. 4. §. 14. says, that though all the wine leaked out, yet if there were no fault in the master, there is no reason the ship should lose her freight. Therefore here the captain having carried the tobacco to *Liverpool* is entitled to freight upon all which was delivered. 2dly, The defendant is bound to pay the freight, he having accepted the conditional consignment made to him, and entered the tobacco at the custom-house in his own name. The commodity was consigned to him till the arrival of *E. Downing*; and there could be no other delivery of it, according to the act of parliament, than was made in this case, namely, at the king's warehouse; and the defendant shewed his acceptance of it in the only way in which he could, namely, by making the entry in his own name; he having before assented to the taking such steps for the preservation of it as was necessary. Therefore, though the captain had a lien upon the commodity, and might have entered it in his own name, yet the defendant having so accepted it, and having thereby taken away the captain's lien, is bound to pay the freight, and must resort to his remedy over against the consignor.

Wigley contra. 1st, In no event would the defendant be liable for the whole freight, but only in proportion for that part of the tobacco which was serviceable; and even as to that the freight per hoghead amounts to more than the

the value. Part of the cargo too was entirely lost, though it does not appear how much; and certainly no freight would be due for that, according to the cases cited. But 2dly, Even if any freight were due, the defendant is not liable. He was not the consignee of the goods, but what he did was merely as agent to *E. Downing*. There was no delivery to or acceptance by him of the commodity. The lodging it in the king's warehouse was the act of the captain, in order to avoid a seizure, and by so doing he did not part with his lien. The defendant had no legal title to the goods, nor could he have brought an action for the non-delivery of them to him. The bill of lading conveyed the property to *E. Downing*, and there could be no acceptance by the defendant on his own account, and this was known to the captain. The entry at the custom-house was an act of necessity to avoid a seizure, and was done by the defendant as agent for *E. D.*; at most it was only *prima facie* evidence of an acceptance by the defendant, which is explained by the circumstances of the case. The plaintiff is not without remedy, as he may recover whatever he is entitled to receive against the consignors.

Searlett in reply. As between the defendant and *E. D.* the former may be considered as acting only in the capacity of an agent; but as to others he acted as owner in his own name. Every consignee is an agent in respect to his consignors; but if he accept the goods, he makes himself liable to others as owner. The letter addressed to the defendant by the consignors authorised him in the usual course of mercantile dealing to take to the cargo till the arrival of *E. D.*; and if *E. D.* had not arrived at all, would have authorised the defendant to sell it. Then the question must be considered as the matter stood at the time

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time of the arrival of the cargo, which was before *E. D.* came to *England*; and the defendant having accepted it then, the right to demand the freight of him accrued at that time, and could not be defeated by the subsequent arrival of *E. D.*

Lord KENYON C.J. I do not see upon what ground the defendant can be made liable to this demand. In the first place, I am not satisfied that the captain parted with his lien upon the tobacco for his freight by the delivery of it into the king's warehouse; it was deposited there in compliance with the requisitions of an act of parliament, and was still disposeable according to the just claims of all parties. The situation of the defendant was this; he received a letter from the consignors in *America*, with whom he had had no commercial dealings before, informing him of the tobacco being consigned to *E. Downing*, to whom the bills of lading were directed, and that *E. D.* was shortly expected to arrive at *Liverpool*; but in case he did not arrive in time to see to the sale of the commodity, desiring the defendant to do the best for them. In the mean time the ship arrived, and the damage was sustained; and it became necessary for some person to make an entry of the goods at the custom-house in order to prevent their seizure. This was done by the defendant, acting for the benefit of *E. D.*, to whom and not to the defendant the bills of lading signed by the captain were addressed. And now in consequence of the defendant's having thus interposed his good offices to preserve the goods from seizure, he is called upon by the captain to pay freight to the amount of more than the goods are worth. There is no pretence for such a demand. The goods were consigned to *E. D.*; the defendant had no interest in them; there

was

was no contract either exprefs or implied between the plaintiff and him; that he ſhould pay the freight; and it is very ſingular that the plaintiff ſhould have elected to have brought his action againſt the defendant rather than againſt the ſhippers of the goods from whom he could doubtleſs recover.

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GROSE J. To render the defendant liable there muſt be a contract either exprefs or implied between him and the plaintiff for the payment of the freight. The former is not pretended; and how can ſuch a contract be implied when the goods were not even conſigned to the defendant. For his name which was originally inſerted in one of the bills of lading was ſtruck out, and the name of *E. Downing* inſerted inſtead, with the knowledge of the plaintiff himſelf. Then it is ſaid, that the defendant made an entry of the goods at the cuſtom-houſe in his own name. But that is explained by the letter from the conſignors, in which he is deſired to do the beſt for them in caſe *E. D.* to whom the goods were conſigned did not arrive in time. What he did therefore was as agent for *E. D.* one of the ſhippers to whom the goods were conſigned: but he himſelf had neither juſ in re nor ad rem, and can in no reſpect be chargeable for the freight.

LAWRENCE J. The captain would not have done his duty if he had delivered the tobacco to any but the conſignors, or their conſignee, or his aſſigns. Now the defendant did not ſtand in any of theſe relations: he was only in poſſeſſion of a bill of lading to deliver the goods to *E. D.* or his aſſigns, not indorſed by him; and alſo a private letter of advice from the ſhippers, requeſting that if *E. D.* did not arrive in time the defendant would do the

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best for them. The captain then knew that the defendant in whatever he did acted only as agent for *E. D.*, and if the captain did not like to trust *E. D.* for the amount of the freight, he should either have entered the tobacco in his own name, or at least have given notice to the defendant that he would not part with his lien without the pledge of his security for *E. D.* But knowing the character in which the defendant interfered, this is an unconscientious attempt to convert his act into an acceptance of the goods on his own account.

LE BLANC J. I consider the defendant as having acted merely as the agent of *E. D.*, and therefore that any delivery by the captain to the defendant was a delivery to him as such agent on account of his principal; therefore *E. D.* himself is the person liable to the captain for the freight. The precise time of *E. D.*'s arrival is not stated, but the only act of the defendant pretended by the plaintiff to amount to an acceptance of the goods is the making of the entry, which he knew at the time was done on behalf of *E. D.* as his agent. The captain was not bound to have parted with the goods till his lien was satisfied; but because he did not think it worth his while to keep them, it is no reason for calling on the defendant for payment of the freight.

Postea to the Defendant.

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INGLIS and Others, Assignees of CRANE a Bankrupt, against USHERWOOD.

Tuesday,
June 9th.

IN trover for certain bar iron, hemp, and deals, tried before Lord Kenyon C. J. at *Guildhall* at the sittings after *Hilary* term, a verdict was entered for the plaintiffs, subject to the opinion of this Court, on the following case.

On the 13th of *September* 1798, *Crane* entered into an agreement for a charter-party of that date with the defendant at *London*, whereby the latter as captain of the ship *William* agreed to sail to *St. Petersburg*, and there load from the factors of *Crane* a complete cargo of stowage goods with iron for ballast, and deliver the same at *London* at a certain freight per ton; one half of the freight to be paid on unloading and right delivery of the cargo, and the remainder in three months following, under a penalty of 1000*l.* for non-performance of the agreement. The captain was to sign bills of lading for this cargo, and to address to Messrs. *Bohtlingk* and Co. at *St. Petersburg*. On the 15th of *September* the ship sailed from *London*; and on that day *Crane* sent by the defendant a letter addressed to *Bohtlingk* and Co., wherein he informed them, "the bearer is Capt. *Usherwood* of the *William*, whom I have chartered and sent out to your address, and by whom you will please to load 40 tons of hemp, 60 tons of iron," &c. "which goods you will please to purchase on my account, and for the amount of the same your drafts on me shall have accustomed honor," &c. Signed C. T. *Crane*. In another letter of the 18th *September*,

A delivery by the consignor of goods on board a ship chartered by the consignee is a delivery to him, and the consignor cannot afterwards stop them in transitu. But where the delivery was made on board such a ship in *Russia*, and by a law of that country the owner of goods in case of the bankruptcy of the vendee may sue out process to retake his goods on board a ship, &c. and retain them till payment; and the owners hearing of the insolvency of the vendee applied to the captain on board of whose ship the goods had been delivered to sign the bills of lading to their order, which he complied with, without the necessity of suing out process; held that this was a substantial compliance with such law, and that the captain on his arrival here was bound to deliver the goods to the order of the vendee who had become bankrupt.

dors and not to the assignees of the vendee who had become bankrupt.

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Crane wrote to the same persons; "let capt. *Usherwood* have a few tons more of hemp on my account, if he want it to fill up;" and if Messrs. C. and Co. have no hemp, &c. to ship, you will then please to let off the freight for a like quantity of stowage goods in order to fill the vessel." And again, "the amount of these goods is to be drawn for a month after shipping, deducting therefrom the amount of my consignments," &c. The letters of the 18th and 15th of September were received by *Bothlingk* and Co. on the 12th and 13th of October; and on the 16th of October they wrote in answer to *Crane*: "The ship *William* is just arrived. We shall do all in our power to ship as soon as possible. We have already bought for your account 60 tons of iron, &c. It is uncertain whether we shall be able to procure you the quantity of tallow ordered. The lay days stipulated in the charter-party of capt. *Usherwood* do not permit us to wait too long: we are therefore afraid we shall be obliged, in order not to expose you to a greater loss, to arrange matters with capt. *U.* as we have done with capt. *R.* by giving him deals." On the 19th of October, *Bothlingk* and Co. inclosed the invoices for the iron and tallow in a letter to *Crane*, saying, "By our next you will receive the bills of lading. We have purchased for your account 56 bundles of hemp, &c.; they are already shipped on board of a lighter for *Cronstadt*, and we will send you the invoices by the next post." On the 23d of October they inclosed the invoices of the hemp to *Crane*. On the 16th of October they sent *Crane* the bills of lading for the tallow, and wrote him word that they would send the other bills of lading in their next. The invoice of the iron was dated the 19th October 1798, that of the hemp the 23d, and that of the deals on the

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2d of *November*. The two first were intituled, the one, "Invoice of 2395 bars of iron;" and the other, "Invoice of 56 bundles of outshot hemp; bought for ready money, and shipped in a lighter for the ship *William*, capt. *R. Usherwood* of *London*, for account and risk of Mr. *C. F. Crane* in *London*." That of the deals, which was sent in a letter of the 2d of *November*, was intituled in the same manner, except omitting the lighter. In each of the invoices *Bohtlingk* and Co. charged brokerage and commission; and at the foot of each are the following words; "We debit your account current for the amount." All the goods in question were shipped between the 19th of *October* 1798, and the 29th of the same month, both days inclusive, for and on account of *Crane*, but *Bohtlingk* and Co., having received information of the insolvency of *Crane*, caused bills of lading to be made out, which were signed by the defendant, and by which the goods in question were to be delivered to the order of *Bohtlingk* and Co., and the same were by them indorsed and transmitted to *John Schneider*, their agent or correspondent in *London*, in a letter dated the 2d of *November*, and were received by him accordingly; who made insurance thereon. On the 30th of *November* *Bohtlingk* and Co. wrote to *Crane*, under cover to *Schneider*, a letter, wherein after expressing their doubts of his solidity, and dissatisfaction with his correspondence, they proceed; "We were surprised again to receive an order for the shipment of different *Russian* commodities by the *William*, Capt. *Usherwood*, at a time when the situation of the *London* markets, compared to that of ours, left no other prospect in that undertaking, than a loss as certain as considerable. Too much attached to your interest, we should have preferred the entire non-execution of your order, and sacrificed our

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"commission,

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“ commission, if the engagement made by you with the
 “ captain had not compelled us to give him his loading.
 “ We have still acted on this occasion with so much good
 “ faith, that we already remitted last post the bill of lading
 “ for 100 casks of tallow: but we have since received
 “ from our friends at *Hamburg* the most alarming intelli-
 “ gence concerning you, which proves that you have not
 “ been exact in acquitting our bills of the 15th of *June*.
 “ You will acknowledge that this obliges us to act with
 “ more precaution, and we trust you will not be against
 “ the just request we make you, to furnish our friend Mr.
 “ *J. Schneider* with good security for the amount of the
 “ goods by the *William*: it is on that condition only, that
 “ we authorise him to deliver you the bills of lading of
 “ the hemp, iron, and deals which we are going to send
 “ him. In the contrary case you will have the goodness
 “ to deliver him without delay the bill of lading indorsed
 “ for the 100 casks of tallow, of which he holds the du-
 “ plicate. Afterwards Mr. *Schneider* will make use of
 “ those documents to receive the cargo and effect the
 “ sale thereof for your account, employing the proceeds
 “ thereof in acquitting the bills of about 36,000 rubles,
 “ which we shall draw on you in a month, as we have
 “ already agreed. Still we hope you will not suffer the
 “ matter to come to that extremity, and that you will
 “ sooner make the necessary arrangements with Mr.
 “ *Schneider* to make us easy. Our old account, excepting
 “ the shipment by the *William*, will nearly balance by
 “ means of your consignments which are just arrived, and
 “ the bill which we drew on you dated 1st *October* for
 “ 8000 rs. Supposing always that there are no bad debts
 “ among those outstanding, for your account. As for the
 “ rest we rely perfectly on your probity that you will be
 “ exact

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“ exact in paying duly our said bills of the 1st *October*, as
 “ well as those of the 31st *August*, of 21,000 rubles,” &c.
 On the same day they wrote another letter to *Crane* by
 the post, containing this paragraph: “ We notify to you,
 “ that we shall draw on you in the course of a month
 “ from this time the amount of the cargo per the *William*,
 “ Capt. *Usherwood*, and we request you’ll honor our bills.
 “ Our old account is nearly balanced by the bills which
 “ we last drew on you.” On the 2d *November*, *Bobtlingk*
 and Co. wrote to *Crane*: “ We confirm our last by the
 “ last mail, and are since without any of your favours.
 “ This serves to inclose you invoice of deals by the
 “ *William*, Captain *Usherwood*, amounting to rs. 436:35.
 “ We confirm to you what we lately advised you of,
 “ namely, that we shall draw on you after a month for
 “ the amount of our shipments by the abovementioned
 “ vessel, our old account being nearly balanced by the
 “ bills which we have already drawn on you,” &c.
 “ We send this day to Mr. *Schneider* the bills of lading
 “ for the iron, hemp, and deals, per the *William*, Captain
 “ *Usherwood*. If you will then fulfil the condition we
 “ made to you to give Mr. *Schneider* the needful security,
 “ he will deliver you all the bills of lading; if not, he will
 “ receive from you the bill of lading for the 100 casks of
 “ tallow, and on the arrival of the ship receive her cargo,
 “ and afterwards procure the sale thereof for your ac-
 “ count: at all events we have no doubt but that you will
 “ use every necessary means to satisfy the just demands
 “ we here make you; and thus this business will end
 “ without giving any trouble to you, and any uneasiness
 “ to us.” On the 6th *November*, *Bobtlingk* and Co. wrote
Crane a letter containing this paragraph: “ On the 2d
 “ of *November* you received bills of lading and invoice of

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FACTS
and Others
against
WILKINSON.

" 445 deals per the *William*, Captain *Usherwood*, and we
 " requested you to credit us for their amount rs. 436:35:
 " We repeated to you that we should draw on you after
 " one month for the amount of the shipment by the said
 " vessel." To which was added the following postscript:
 " We have withheld this letter until this day, the 9th of
 " November, and can with pleasure assure you that Capt.
 " *Usherwood* has since sailed. We hope that he will have
 " a speedy and safe voyage." The iron, hemp, and deals
 in question were, on the ship's arrival at the port of
London, viz. on the 4th of *January* 1799, demanded of
 the defendant by and on the behalf of the plaintiffs, and a
 tender of the freight charges and expences was duly made;
 but the defendant did not deliver the same to the plain-
 tiffs. *Crane* committed an act of bankruptcy in *England*
 before any of the goods were delivered on board the
William in *Russia*, but not before the purchase of the iron
 on his account, viz. on the 16th *October* 1798, and a com-
 mission of bankrupt afterwards issued against him, under
 which he was declared a bankrupt, and the plaintiffs
 chosen his assignees. The defendant on the 12th of
January delivered the iron, hemp, and deals in question
 to *Schneider*, for and on account of *Boblingk* and Co.,
 agreeable to their indorsements of the bills of lading, upon
 being indemnified by *Schneider* as the agent of *Boblingk*
 and Co. By one of the mercantile navigation laws of
Russia, published the 25th of *June* 1781, sect. 138. " it
 " is ordered, that if in case of unpaid debts or bankrupt-
 " cies any body has reason to suspect that the debtor or
 " bankrupt has any thoughts of making the creditor lose,
 " and therefore loadeth on board of ship or vessel goods
 " or cargo; in such a case the creditor is to give notice
 " in town to the head judge of the court, (in districts to
 " the

"the chief,) that the ship, or vessel, or goods, or the whole cargo should be retained time enough until the full payment is made to whom due." (a) "In consequence whereof, and by virtue of this law, if the seller or shipper in case of bankruptcies can identify that the merchandize belonging to him is here in ships, warehouses, or wherever they may be, in such a case the goods must be given back to the sellers or shippers, being their property, and cannot be brought in concurs." *Bobtlingk and Co.* did not give notice to the head judge of the court, or detain the ship *William*, or her cargo, or any part thereof. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover?

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IN *ELLIS*
and Others
against
UNION WORKS.

Gaselee for the plaintiffs contended, 1st, That this being a delivery of goods by the consignor on board a ship chartered by the consignee, was a delivery to the consignee himself, and therefore the former was debarred from the right of stopping the goods in transitu upon the bankruptcy of the latter. In *Ellis v. Hunt* (b), after the goods had arrived at an inn in the place to which they were directed, and the assignee of the consignee had put his mark on them, that was holden to devert the consignor's right to stop them in transitu. There it was said, that there might be a delivery of goods by giving the key of the warehouse where they were deposited to the purchaser. A fortiori therefore, a delivery to the consignee's warehouse would be a delivery to him: and a chartered ship is no more than the floating warehouse of the party by whom it is chartered. All the correspondence between the parties

(a) What follows was understood to be a comment upon the before cited law.

(b) 3 Term Rep. 464.

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against
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stated in the case shews that *Bobtlingk and Co.* considered the defendant as *Crane's* agent. But this point was expressly determined in the case of *Fowler and another, assignees of Hunter and Co. v. McTaggart and Co.*, tried before *Grose J.* at *Bristol*, and cited in *Hodgson v. Loy (a)*, that a delivery of goods into a ship chartered by the vendee, defeated the vendor's right to stop in transitu. That was trover by the assignees to recover the value of a certain quantity of tobacco shipped by the defendants by the order of the bankrupts, on board the *Minerva*, bound from *London* for *Naples* and *Alexandria*, which ship was chartered to the bankrupts for three years from *July 1792*, and which was paid for by a bill at three months, drawn by the defendants on the bankrupts, and accepted by them. The goods were shipped on the 4th of *February 1793*, for which the mate's receipt was given, and an invoice thereof was made out by the defendants in the names of the bankrupts. The vessel was detained by contrary winds at *Portsmouth*, during which time the bankrupts having stopped payment about the 11th of *March 1793*, the defendants procured bills of lading to be signed by the captain to them, and obtained possession of the tobacco in *September 1794*, and procured it to be relanded, and afterwards disposed of for their benefit. Here indeed the bankruptcy of *Crane* happened before the delivery of the goods on board the *William*; but it has been often ruled, that the bankruptcy of the vendee is no countermand of the goods, or annulling of the contract; as in *Ellis v. Hunt*, and other cases. Then 2dly, the law of *Russia* cannot vary this case, because, sup-

(a) 7 Term Rep. 442. The circumstances here stated which do not appear in the printed report were read from the brief in the cause.

posing it to apply to the case of a chartered ship, it has not been pursued. A method is there pointed out for the consignors to regain possession of his property; namely, by process before the municipal judge: but that did not authorize him to take bills of lading to his own order from the captain of the vessel, who, though *Crane's* agent, was agent only with a limited authority, according to the terms of the charter-party, and therefore could not bind *Crane* beyond that authority; no more than in the case of *Fowler v. M^r Taggart*: And though by the terms of the charter-party the captain was to sign bills of lading; yet was for the purpose of enabling *Crane* to sell the goods while the ship was on its passage.

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 TWENTY
 and OTHER
 AGAINST
 USHERWOOD.

Wood contrà was stopped by the Court.

LORD KENYON C. J. The decision in this case will not at all trench upon the general rule of law, respecting the right of stopping goods in transitu: but giving the plaintiffs the full benefit of the argument, that the delivery of the goods on board a chartered ship was a delivery to the bankrupt, still the circumstance of the *Russian* ordinance set forth in the case varies it very importantly, and takes it out of the general rule. By that law the consignors, under the circumstances stated, had a right to repossess themselves of their goods; and they did so in effect: not indeed by actually taking them out of the ship on board of which they were laden, or by instituting legal process for the recovery of them; but having a right so to do, which it became unnecessary to exert, because it was in the first instance acknowledged and submitted to by the captain, in whose possession the property was, they imposed terms upon him, that he should sign

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 In *Chas*
 and Others
 against
 WALKERWOOD.

bills of lading to their order, upon his compliance with which, they suffered the cargo to proceed to the place of its destination, disposable there as events might turn out. The goods are therefore sent with the condition attached to them. The law of *Russia* in this respect is a very equitable law; and I have often lamented that our own code was defective in the same particular. For every man contracting to supply another with goods acts on the presumption that that other is in a condition to pay for them; and therefore when the condition of the consignee is altered at the time of the delivery, and he is insolvent, and no longer capable of performing his part of the contract, honesty and good faith require that the contract should be rescinded. However the contrary has been settled to be law, unless the consignor stop the goods in transitu before they get into the consignee's possession. But this being a transaction in a foreign country, where a more equitable law in this respect prevails, I am far from being desirous of limiting its operation; and for the reasons before given, I think that the consignors have substantially availed themselves of it; and that the defendant, by delivering the goods to their order, has done no more than he was bound to do.

GROSE J. I agree to the general rule, that a delivery of goods by the vendors on board a ship chartered by the vendee is a delivery to the vendee himself. But the delivery here was made in *Russia*; and by a law of that state the goods were in effect in this case kept in transitu, notwithstanding they were delivered on board a chartered ship. Considering them therefore as in transitu, the *Russian* law is a most equitable provision, and ought to have a liberal construction; for it enables that justice to

be done between the parties, which I have often lamented could not be obtained here.

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LAWRENCE J. If this transaction had happened in a port of this kingdom, the delivery of the goods on board a ship chartered by the bankrupt, would in effect have been a delivery to him. But the law of *Russia*, where this transaction took place, is otherwise. By that law it is provided, &c. [Here he read the law as stated in the case.] Then the owners having a right to repossess themselves of the goods after they were shipped, or in case of refusal to sue out process for that purpose, might have ordered the captain to deliver them up unless he had given them the security required by signing bills of lading to their order, which he complied with: then this was the same in effect as stopping the goods in transitu; and this by the law of *Russia* they were enabled to do, notwithstanding such a delivery.

LE BLANC J. I agree with the construction which has been put upon the law of *Russia* in this case, and that the owners had a right to stop the goods notwithstanding the delivery which had taken place. Then instead of having recourse to legal process for that purpose, the owners first required of the captain to sign the bills of lading stated in the case to their order. If he had refused, it would then have been time enough for them to have used the compulsory process of the law; but that was unnecessary to be resorted to by the captain's compliance with their demand. Accordingly the captain signed bills of lading to their order, which was in effect a redelivery to the owners; in consequence of which, instead of stopping the goods by legal process as they might and would otherwise

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otherwise have done, they suffered them to remain on board the ship and to proceed to the place of destination. Therefore the law of *Russia* makes all the difference between this and the other cases referred to.

Postea to the Defendant.

Wednesday,
June 10th.

The KING against The Inhabitants of EVERTON.

A son of age and married continuing to live with his father does not follow a settlement subsequently acquired by the father in another parish to which the son also accompanied him as part in fact of his household.

TWO justices by an order removed *John Payne*, his wife and children, by name, from *Great Barford* to *Everton*, both in the county of *Bedford*. The Sessions, on appeal, stated the following case: That *Thomas Payne*, the father of *John Payne* the pauper, being legally settled in *Everton*, resided there from the year 1779 to 1790 with his family, of which during the whole of that period the pauper was a part. In the year 1782, the pauper being 22 years of age, married *S. Barker* his first wife. The pauper and his said wife lived in the family of *T. Payne* the father, and as a part thereof, until her death, which happened in the year 1783. There was no issue of that marriage. The pauper never left the family of his father, but continued with him after the death of his said wife; and in the year 1790 removed with his father to *Great Barford*. The pauper's father afterwards, and during the time the pauper continued in his family, acquired a settlement there. And in *April* 1796, the pauper, who still continued to live with his father, married *Mary Reynolds*, by whom he had the children mentioned in the order. That the pauper had gained no settlement in his own right. The Sessions, being of opinion that the pauper was emancipated from the family of his father by his marriage with *S. Barker*, affirmed the

the order of the two justices, subject to the opinion of this Court.

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Wilson, who was to have supported the orders, was stopped by the Court.

Const, contra, said that it had never been decided that marriage alone was an emancipation, but it was always accompanied with a departure from the house and protection of the father. On the contrary, it was considered otherwise in the case of *R. v. Wingham (a)*. But at any rate the fact found by the sessions was conclusive against it in this case; for it is stated that during the whole period of his marriage with *S. Barker* his first wife, he was *part of his father's family*.

Lord KENYON C. J. The Sessions could not intend more by that statement than to inform us that locally and personally the pauper lived in the same house with his father, and took his fare at the same board with him; but they wish to be informed whether that so far constituted him in point of law one of his father's family under the circumstances, as that after his marriage he would follow a newly acquired settlement of the father; and I am of opinion that it did not.

Per Curiam,

Both Orders affirmed (b).

(a) *Burr. S. C.* 223.

(b) In the case of *Bugden v. Amptbill*, *Burr. S. C.* 270. the son after his marriage lived separate from the father, and both these circumstances formed ingredients in the opinion delivered by three of the judges. But *Wright J.* only relied on the marriage of the son, "by virtue of which he becomes the head of his own family, which is an independent family." The same circumstances of marriage and separation from the father's household occurred in *R. v. Heath*, 5 *Term Rep.* 583. But in *R. v. Witton cum Twainbrookes*,

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3 Term Rep. 356. Lord Kenyon enumerates *marriage* without more as one of the grounds of emancipation: but the point was never expressly decided before the present case; and here the circumstance of the son's being of age forms an ingredient. But it did not appear whether any stress were laid upon it in the judgment of the Court; though probably there was, as *Wilson* included that fact in the statement of the question before he was stopped by the Court.

Wednesday,
June 10th.

THE KING *against* **THE INHABITANTS OF TARDEBIGG.**

The renting by a needle-maker of certain runners in another's mill, together with a packeting room, of all which he had the exclusive use (a runner being a piece of machinery for scouring needles screwed down to the floor of the mill,) the whole being of the annual value of above 10*l.* including the separate value of the runners, is not the taking of a tenement, whereby a settlement can be gained.

TWO justices by an order removed *Ann Westwood* from *Tardebigg* to *Alvechurch*, both in the county of *Worcester*. The Sessions, on appeal, quashed the order, subject to the opinion of this court upon the following case.

The pauper's late husband, *Aaron Westwood*, was a settled inhabitant of *Alvechurch* previous to the year 1790. In the course of that year he took of *H. Milward* three runners for scouring needles in a mill belonging to *Milward*, situate in *Tardebigg*, and a packeting room, at the rent of one shilling per packet, for every packet of needles scoured thereat. About two years afterwards *Milward* built a cottage for *Westwood*, situate near the mill in the parish of *Tardebigg*, and *Westwood* took the same of *Milward* at the rent of 2*s.* 6*d.* per week. About two years afterwards *Westwood* also took of one *Bartlett* three other runners for scouring needles in another mill, belonging to the said *Bartlett*, situate in the parish of *Tardebigg*, at the like rent of one shilling per packet for every packet of needles scoured thereat. And soon afterwards *Westwood* took of *Bartlett* another runner and a packeting room in the last-mentioned mill, at the rent of 2*s.* 6*d.* per week. He worked at the same respectively, and occupied the cottage and runners till the time of his death, which happened

pened about two years ago. A runner consists of two pieces of wood, each about five feet long and eighteen inches broad: one of them is fixed with screws to the floor of the mill, which may be unscrewed and removed at pleasure: the other is moved upon it horizontally backwards and forwards, by means of a piece of timber fixed thereto at one end thereof, and which communicates at the other with the wheel of the mill: and between these pieces of wood needles are scoured in bags with oil and emery dust. The runners so rented by *Westwood* were the property of *Milward* and *Bartlett*. In the mills of this description there are usually in the same place several different runners worked by different workmen; but at the time when *Westwood* took the said three runners of *Milward* they were divided by a partition from the other runners in the same mill; but the partition being found to take up too much room was afterwards removed, and *Westwood*, his wife, and their two children slept in the same mill from the time they first took it until *Milward* had built the said cottage, a period of about two years. One floor of a mill will contain several runners, some of which may be placed on the floor, and others immediately over: these, in a frame of wood about two feet above the undermost. For some time *Westwood* worked at scouring needles at the rate of six shillings and sixpence per packet, for *Milward* only. Afterwards *Milward* not continuing to have sufficient employ for *Westwood*, he worked for other masters. No other workmen had any right to use the runners so rented by *Westwood*, without his consent; but *Westwood* had the exclusive right to the use of them and the packeting room. The materials used in scouring the needles were provided by *Westwood*; and the rent which he paid to *Milward* and *Bartlett* for the runners so

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taken of them, and for the cottage taken of *Milward*, amounted together to more than ten pounds per annum.

When this case was called on, the Court asked how it could be distinguished in principle from *Rex v. Dodderbill* (a).

Erskine and *Fervis* in support of the order of Sessions said, that there the pointing places in the mill, which were equivalent to the runners here, were not in the *exclusive* possession of the pauper, who was only at liberty to use any two out of several pointing places. But here the pauper's husband had an exclusive possession of particular runners, as well as to the packeting room, with which the runners were connected; thereby adding to the value of the packeting room, which no doubt was a tenement. The pauper's family slept there for a time. Altogether therefore it was a taking of part of the mill. In *Rex v. Whitechapel* (b) it was holden, that a furnished room with fire found in it, rented by the week for a particular purpose, that of a justice meeting, and the landlord to have the use of it at other times, was a tenement sufficient to confer a settlement: though no doubt the value of 10*l.* a-year was made up by the addition of the fire and furniture.

Caldecott and *Ryder* contra were stopped by the Court.

LORD KENTON C. J. There is no distinguishing this from the case of the *The King v. Dodderbill*. A runner is no more a tenement than a pointing place is so. It might as well be said to be a taking of a tenement if a man contracted to pound in a certain mortar, or to use a particular

(a) 8 Term Rep. 449.

(b) Hil. 26 Geo. 3. 2 Const. 154. pl. 194.

grinding-stone in a mill. It is not in effect a taking of a part of the mill as a tenant, but a licence to use a particular part of the machinery of it for the purpose of manufacture, and for no other purpose.

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LAWRENCE J. The case of *The King v. Whitechapel* does not apply; for here the particular value of the runner is found, which is necessary to be taken into the account to make up the 10*l.* a-year; and that not being a tenement cannot confer a settlement. Besides, it is not even stated that the runner is in the packeting room which was appropriated to the pauper's use.

Per Curiam,

Order of Sessions quashed.

The KING *against* The Inhabitants of RAINHAM. *Wednesday, June 10th.*

TWO justices by an order removed *Moses Smith*, his wife and six children, by name, from *Rainham* in the county of *Essex* to *Eltham* in the county of *Kent*. The sessions on appeal quashed the order, subject to the opinion of this Court on the following case: The pauper on the 8th of *November* 1784, entered into an agreement under seal with one *Hills* a sawyer living in *Eltham*; which agreement is in the words and figures following, (viz.) “An agreement made the 8th of *November*, 1784, “between *T. Hills* of *Eltham*, sawyer, and *M. Smith* “of the same place; viz. *Smith* doth agree with the said “*T. Hills* to serve him for three years from the date of “the agreement in the following manner, viz. for the “first year to be paid ten shillings per week, for the “second year eleven shillings, and for the third year “twelve shillings per week. And the said *T. Hills* doth

A contract under seal, and stamped, to serve another for 3 years at so much per week, the master agreeing to learn the other a trade, and the latter agreeing, if he lost any time to the prejudice of his master, to abate so much per day, constitutes an apprenticeship. And at any rate the pauper having served under it for more than a year gained a settlement either as an apprentice, or as a hired servant.

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“ agree and promise to learn the said *M. Smith* the art
 “ and mystery of a sawyer, which he now follows. And
 “ it is likewise agreed, that if *Smith* shall wilfully lose
 “ any time to the prejudice of *Hills*, he doth hereby
 “ agree to pay to *Hills* three shillings per day for all such
 “ neglect. And it is hereby further agreed, that if
 “ *Smith* repents of this agreement before the time expires,
 “ he promises to pay *Hills* 10*l.* on demand; or if *Smith*
 “ is sick, or by any disorder or misfortune rendered in-
 “ capable of work, not to receive any pay from *Hills*.”
 The agreement was signed, sealed, and delivered by
 both parties, and lawfully stamped. No premium was
 paid by the pauper to *Hills*. The pauper in pursuance
 of the agreement immediately went to *Hills*, and resided
 with him in *Eltham*, under and according to the terms
 and conditions of the agreement for two years and a
 half.

Proby and *Wingfield*, in support of the order of Sessions,
 contended, that in order to gain a settlement by serving
 as a hired servant, or as an apprentice, it was not only
 necessary that there should be legal contract to serve spe-
 cifically in one or other of those capacities, but the parties
 should so intend; for if it be either uncertain in what
 capacity the pauper contracted, or if it appear that the
 parties intended the service to be in another character
 than that which enures by construction of law from the
 nature of their contract, no settlement can be gained
 from such contract and service. This was pointedly ex-
 pressed by the Court in *R. v. Laindon* (a), where it was
 holden that a defective contract of apprenticeship (there

(a) 8 Term Rep. 379.

being no stamp) could not be converted into a contract of hiring and service. It was indeed there decided, that a contract of apprenticeship might be framed without the party being retained eo nomine as an apprentice: but there stress was laid on the circumstance of a premium having been given to the master to teach the other his trade. On the other hand, in *R. v. Coltjball (a)*, where no premium was given, and the pauper was to do any other kind of work besides the trade which he was to be taught, under which he served above a year, it was holden to enure as a hiring and service, notwithstanding the principal object was to learn the trade. Now here it is uncertain in what capacity the service was intended to be performed: not as an apprentice; for the pauper was not retained by that name, nor was any premium given, as in *R. v. Laindon*, and he was also to receive wages: not as a servant; for he went to learn a trade, and was not compellable, as in *R. v. Coltjball*, to do any other kind of work. And it is probable, by the finding of the Sessions giving no effect to this contract and service, that they were of opinion, that though the contract enured as an apprenticeship in law, yet that the parties in fact intended a hiring and service.

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Trower and *Bosanquet* were to have argued *e contra*.

LORD KENYON C. J. The Sessions have stated the deed and the service under it in fact, leaving this Court to draw the legal conclusion; and that can only be done in one way, namely, that this was a contract of apprenticeship. The instrument was under seal, and need not be indented (*b*). It has been determined, that the party serving

(a) 5 Term Rep. 193.

(b) Vide Stat. 31 Geo. 2, c. 21.

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need not be retained *eo nomine* as an apprentice; but that it is enough if the purpose of the contract be, that the one shall teach and the other learn the trade. That is the case here; for the master engaged to learn, i. e. to teach, the pauper the art and mystery of a sawyer; and the object of the pauper was to be taught the business. No technical words are necessary to constitute the relation of master and apprentice: nor is it necessary that there should be any premium given to the master.

LE·BLANC J. The contract was either to serve as an apprentice, or as a hired servant; it is immaterial which it was in this case; for as the pauper served above a year under the agreement, quâcunque viâ datâ, he gained a settlement.

Per Curiam,

Order of Sessions quashed.

Wednesday,
June 10th.

The KING *against* The Churchwardens and Overseers of the Poor of the Lower Quarter of the Parish of ALBERBURY in the County of *Salop.*

Lime works are rateable in the hands of the occupier, though there be risk and expence in the working, and the profits are uncertain.

ON an appeal against the poor rate, because neither the proprietors nor the occupiers of certain lime works within the said quarter were rated therein for the said works, and in order to have the general question settled, viz. whether such works are rateable to the poor or not? the following case was agreed upon and has been returned by the Court:

William Jellicoe appealed to the last quarter sessions for the county of *Salop* against a rate made by the churchwardens and overseers of the poor of the lower quarter of the parish of *Alberbury* in the same county. The sessions
 amended

amended the rate by charging *John Morris* and *T. But-terton* 173 *l.* as joint occupiers of certain lime works in the quarter. It appeared that *John Morris* and *T. But-terton* were joint occupiers of certain lime works in the quarter under *Sir Robert Leighton* and *Richard Lyfter Esq.* to each of whom they pay a royalty, amounting upon an average to 200 *l.* to *Sir Robert Leighton*, and 60 *l.* to *Mr. Lyfter*, per annum. The lime-stone when got is burned in kilns on the premises. Owing to the risk and expence of working, the profits of the occupiers are very uncertain. The only question is, Whether the occupiers or proprietors, or either of them, are rateable to the poor for these lime works?

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Erskine, Caldecott, Benyon, and Clifford, in support of the order of Sessions. The only ground on which the negative of the question can be argued for is, that "owing to the risk and expence of working, the profits of the occupiers are very uncertain." But if there be profits, whether more or less, they must be liable to be rated, and the quantum is a question for the sessions alone to determine. The produce of all labour must be attended with expence and risk; and from the nature of a lime work, the expence and risk is capable of being more accurately calculated than most other concerns (a). In *R. v. Vandewall* (b) quit rents and other casual profits of a manor were not considered as the objects of rating; but that was because they arose out of the profits of land for which the occupiers were rateable in another shape. [Lord *Kennyon* C. J. The case of quit-rents goes on the objection of double rating the same property in the hands of the landlord as well as the tenant.] In *Atkins v. Da-*

(a) Vide *Atkins v. Davis*, *Cald.* 324, 5. 333.

(b) 2 *B.rr.* 991. 1 *Blac.* 222. S. C.

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vis (a), Lord *Mansfield*, though arguing against the rateability of the *London* water-works, assumes it to be clear that a lime-stone quarry would be rateable: and this upon the same universal principle that the case of the *Cheltenham* spring (b) went, as so much profit arising out of land. The reason why lead mines (c) were holden not to be rateable, was not because of any supposed risk or expence, or uncertainty of profit attending the adventure; but because *coal* mines alone were mentioned in the stat. 43 *Eliz. c. 2.* which was taken to be an exclusion of all other mines. It is not, however, every excavation of the earth which is a mine; otherwise a gravel, or marl, or sand-pit might be said to be a mine; but it must be such as requires skill and science in the working, and which is effected by means of mechanical operations: whereas the lime rock lies for the most part at or near the surface, and is worked by common labourers in the ordinary course of their employment.

The *Attorney General*, *Gibbs*, and *Pemberton*, contra, contended that this was a mine, and therefore must be governed by the same principle as the case of the lead mine. That it was not like the case of the *Cheltenham* spring, for that was a rate upon the land itself, rendered more valuable on account of the spring rising within it. But this was a rate specifically upon the lime works, independent of the land; and therefore it was liable to the same objection, as with respect to quit-rents, that it was a double rate upon the same property. That the *uncertainty* of the profits was in itself an objection which went to the rateability of the subject matter; and was the

(a) *Vide Atkins v. Davis, Cald. 338.*(b) *R. v. Miller, Corp. 619.*(c) *R. v. Richardson, 3 Burr. 1341.*

ground on which the case of *Rex v. Vanderwall* was determined.

Lord KENYON C. J. The only question is, Whether the persons named in the rate as the occupiers of the lime works are rateable in respect of that species of property? The landlords, who derive a certain profit upon it in the nature of rent, could not have been rated, because that would be to rate the subject matter twice. But what possible objection can there be to the rate upon the occupiers. There is no pretence to call this a mine. But the land itself is convertible into a source of profit, said indeed to be uncertain; but it is well known to be productive, and the very statement of this case shews it to be so (a). And as to the quantum, that must be settled by the sessions.

Per Curiam,

Rule for quashing the Order of Sessions discharged.

(B) The profits paid to the land owners were considerable: and in *Rex v. Parrott and others*, 5 Term Rep. 593. the lessee of a coal mine was holden liable to be rated, though he derived no profit from the mine after paying the rent to his landlord.

SCHUMANN *against* WEATHERHEAD.

Thursday,
June 11th.

THIS was a rule calling on the plaintiff to shew cause why the judgment entered in the cause should not be vacated, and the warrant of attorney to confess judgment, and the deed given to secure an annuity, be declared void

Where a former rule for setting aside an annuity was discharged because it did not appear that an indorsement

[not memorialized] containing a clause of redemption [bearing date after the deed] had been made prior to the execution of it; in which case it could not be received in evidence for want of being stamped; the Court will not enter into the question on a subsequent rule; although it appears clearly that the indorsement was made before the deed was executed; and that such clause of redemption was not inserted in the memorial of the annuity enrolled according to the stat. 17 Geo. 2. c. 25.

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under the stat. 17 *Geo. 3. c. 26.* and delivered up to be cancelled. It appeared upon shewing cause, that in last *Easter* term the defendant obtained a similar rule upon an affidavit made by him, stating, that by an indenture *dated the 30th of November 1793*, for the consideration of 420*l.* he granted an annuity of 60*l.* for his own life to *Schumann*, payable out of a certain rectory and vicarage. That on that indenture there was the following indorsement, *bearing date the 5th of December 1793*: “Memorandum, that at the time of the execution of the within-written indenture, it was agreed by and between the within-named *J. Weatherhead* and *P. Schumann*, that *W.* should be at liberty at any time to redeem the within-mentioned annuity on giving six months’ notice in writing to *S.*, and paying the whole of the arrears then due, &c.” Signed by both parties and witnessed. That *W.* also gave the bond and warrant of attorney, &c. to secure the said annuity. And the defendant’s attorney deposed, that upon searching the proper office he found a memorial of the indenture, bond, and warrant of attorney, enrolled, but no memorial of the indorsement for the re-purchase or redemption of the annuity. Upon shewing cause last term against the first rule, the Court then discharged the rule (though without costs), because the indorsement which appeared to have been executed at a different time from the indenture, was not stamped; without which, considered as a separate instrument, though written on the same parchment, it could not be received in evidence. It now appeared however by the affidavits on which the present rule was obtained, that the annuity was originally agreed to be granted upon the terms of being redeemable; but that by mistake or neglect the indenture had been drawn without such a clause; and therefore when it was tendered
for

for execution on the 30th of *November*, the day on which it bears date, and when it was intended to have been executed, the defendant on discovery of the omission objected to execute it; in consequence of which the indorsement abovementioned was made before the execution of the instrument; and both were executed together on the 5th of *December*, when the indorsement bears date. But the memorial which was inrolled on the 14th of the same month omitted to state the clause of redemption. It also appeared now by the affidavits against the rule, that by two several indentures of assignment, each of a moiety, one dated the 12th of *July* 1800, and the other the 12th of *February* 1801, *Schumann* for a valuable consideration assigned the annuity to one *G. Bifield*, by whom in truth this rule was resisted; and *Bifield* deposed, that *Schumann* had left *England* to reside as he believed in *Germany* before the present rule was obtained; that *S.* had shewed cause last term; and would, it was believed, have stayed here longer, if he had expected that the annuity would again have been questioned.

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Gibbs and *Bedford* shewed cause, and relied on the case of *Greathead v. Bromley* (a) as in point, to shew that where an application had been before made to set aside an annuity, which was canvassed on the merits, and the rule discharged, because no sufficient case was then made out; the Court will not entertain a similar application; at least not without the party can shew some new and material fact, which was not within his knowledge at the time of the first application: for otherwise there never would be an end of litigation. They also objected, that the party

(a) 7 Term Rep. 455.

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or witness to the deed ought not to be admitted to give evidence that it was executed on a different day from that on which it bears date, as that would be to contradict the deed. [But Lord *Kenyon* said, that there was no ground for that last objection: but the *veritas facti* might be shewn.] That at any rate it was too late to take the objection now, having waited till the grantee of the annuity was gone to reside in another country, and the assignee was deprived of the benefit of his testimony. And they cited *Haynes v. Hare (a)*, wherein parol evidence of an agreement, that the grantor should be at liberty to redeem an annuity, was rejected after the death of the grantee,

Garrow, in support of the rule, attempted to distinguish this from the case of *Greathead v. Bromley*; for this was rather to be considered as an opening of the former rule than as a distinct application. The former rule was discharged on the 5th of *May* only, not because it was sworn that the indorsement was executed at a different time from the deed, but because it did not appear that it had been executed at the same time. In consequence of that, the present affidavits were made the day after, and the present rule to shew cause granted in the same term, in order to bring the fact more distinctly before the court. The fact now appears uncontroverted. And as to *Schumann's* absence, if it be supposed that he can alter the statement, this rule may stand over to enable the assignee to procure his evidence. The attention of the Court was not sufficiently drawn to the manner in which this fact appeared in the affidavits upon the former rule; otherwise, instead of discharging that rule and granting another shortly after-

(a) 1 H. Blac. 659.

wards, they would have enlarged the first rule, in order to give the defendant an opportunity of stating the truth of the fact distinctly as it now appears.

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Lord KENYON. C. J. Among the many cases which we have been called upon to decide upon applications for setting aside annuities, none contains a more convenient rule of decision than that which was laid down in *Greathead v. Bromley*; and as the report of that case containing my opinion very explicitly upon the subject, I cannot do better than read what is there stated, in which I fully concur. [His lordship then read that case.] That opinion was grounded upon the maxim, that “interest reipublicæ ut sit finis litium.” Now unless we are prepared to rescind our opinions then expressed, that case must govern the present; for it stands directly on the same ground in every word and circumstance. All the facts existed within the knowledge of the parties at the time of the former rule pending, as are now brought forward. And though if we had then been as fully apprised of all the circumstances as now, it might have altered our opinion; yet it is better for the general administration of justice that an inconvenience should sometimes fall upon an individual, than that the whole system of law should be overturned, and endless uncertainty be introduced. I should be sorry to see one decision in 1798, and a different decision on the same facts in 1801. I think the rule was wisely and not arbitrarily laid down in the case referred to, founded upon analogy to proceedings in other cases. The proceedings in ejectment were invented for the very purpose of obviating the hardship as it was supposed of having a title to real property bound by the first decision. But I do not think there is any hardship in this case. However

I will

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I will not draw in aid any extraneous argument in support of the rule laid down in the case of *Greathead v. Bromley*; but approving it as I do, I think it ought not to be disturbed, and that it governs the present case.

GROSE and LAWRENCE Justices considered the question as concluded by the authority of the case of *Greathead v. Bromley*; and that this matter having passed in rem judicatam, the merits of the case could not now be entered into.

LE BLANC J. expressed himself to the same effect; and added that no injustice would ensue from abiding by the rule; for where it appeared to the Court that there had been a mere slip or mistake in disposing of a former rule, it was not unusual upon a proper case made out to open the rule again: but where the former rule had been disposed of after hearing the parties, as it now appeared upon the very point of objection now urged, he thought they were not entitled to ask to have it opened again.

Rule discharged.

Friday,
June 12th.

BOWEN, one, &c. against SHAPCOTT, in Error.

To a plea in abatement of misnomer of plaintiff, replication that the plaintiff was known as well by the one name as the other: upon demurrer over-ruled, there must be judgment of respondent outter, and not quod recuperet.

THE plaintiff below, by the name of *Sarah Shapcott*, brought her action of assumpsit in *C. B.* against *William Bowen*; to which he pleaded, "that the said *Sarah* now is, and before and at the time of suing out her original writ aforesaid, was called and known by the surname of *Shipcott*," &c. traversing that she was known by the name of *Shapcott*: "and this he is ready to verify, wherefore he prays judgment of the said original

“ original writ and of the declaration aforesaid, and that
 “ the same may be quashed.” Replication, that she the
 said *Sarah*, long before, and at the time of suing out
 her original writ, was called and known as well by the
 surname of *Shapcott* as by the surname of *Shippcott*; con-
 cluding to the country. To this there was a demurrer,
 stating that the matters in the replication contained were
 not sufficient in law for the said *Sarah* to have or maintain
 her said *action* thereof, &c. wherefore, &c. the said
William prays judgment, and that the said *Sarah* may be
 precluded from having her said *action* thereof against him,
 &c. Joinder in demurrer, concluding, as usual, with a
 prayer of judgment and her damages by reason of the
 premises, to be adjudged to her, &c. on which there
 was judgment by *C. B.* that the replication was sufficient
 in law for the said *Sarah* to have her aforesaid *action*
 thereof maintained against the said *William*, &c. by rea-
 son whereof the said *Sarah* ought to recover her damages
 by occasion of the premises, &c. and an award of a writ
 of inquiry to the Sheriff to assess the damages; on which
 the damages were accordingly assessed at 78*l.* 6*s.* 9*d.*,
 and final judgment given for the same, and the costs, &c.
 On this a writ of error was brought, and several errors
 assigned, amongst others, that the said judgment is a final
 judgment for the said *Sarah* to recover her damages,
 costs, and charges aforesaid, against the said *William*;
 whereas it ought to have been an interlocutory judgment
 only, for the said *William* to answer over, &c.

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 BOWEN
 against
 SHAPCOTT,
 In Error.

*Conſi*d for the defendant in error. The rule is, that
 where the judgment prayed goes to the *writ*, there it is
 ut respondeas ouster; but where it goes to the *action*, it
 is quod recuperet. Now here if issue had been taken,
 and

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—
 ROWEN
 against
 SHAPCOTT,
 in Error.

and the fact found against the defendant, the judgment must have been quod recuperet: then by demurring to the replication he admits the fact, and calls for the judgment of the court, whether the *action* be maintainable, and he cited *Gilb. C. B.* 53. But,

By the Court. The rule is laid down in *Eichborn v. Le Maitre*, 2 *Wilf.* 367. that where one plead a fact which he knows to be false, and a verdict be against him, the judgment is final: but upon a demurrer to a plea in abatement, there shall be a respondeas ouster; because every man shall not be presumed to know the matter of law, which he leaves to the judgment of the Court. That rule governs the present case, which is that of a demurrer to a replication to a plea in abatement.

Judgment of *C. B.* reversed, and
 Judgment of Respondeas Ouster
 entered.

Friday,
 June 12th.

PARKE against ELIASON and Others, Assignees of
 PERSENT and BODECKER, Bankrupts.

A. desires leave to place certain long bills in *B.*'s hands, and to be allowed permission to draw without renewals bills of shorter dates, and desires *B.* to calculate the sum to be

drawn for, allowing commission, and the long bills indorsed by *A.* are inclosed to *B.* in the same letter. *B.* answers that agreeable to *A.*'s wishes he had discounted the bills, and then specifies the amount to be drawn for. This transaction is not an exchange or sale of bills upon discount, but a deposit of the long bills on condition of being allowed to draw shorter bills: and *B.* having accepted *A.*'s bills, and such acceptances being dishonoured in consequence of *B.*'s bankruptcy, and the long bills having remained in specie in *B.*'s hands at the time of his bankruptcy, and *B.*'s assignees having afterwards received the value of them, *A.* may recover the amount from them as money had and received to his use.

nion

nion of this court on the following case. On the 17th of *August* 1799 *M. Cullen*, as agent for the plaintiff, wrote a letter to Messrs. *Perfent* and *Bodecker*, merchants in *London*, inclosing several bills of exchange, indorsed in blank by the plaintiff, amounting to 4837 *l.* 10 *s.* 11½ *d.* as follows; “A friend of mine wishes to place the within inclosed bills, amounting to 4837 *l.* 10 *s.* 11½ *d.* in your hands, to be allowed permission to draw without renewals at two or three months, allowing the commission formerly mentioned in your letter. I shall be obliged by your making a calculation of the sum to be drawn for. Your compliance will much oblige, &c.

13th July 1799.	<i>Sterling</i> and <i>Hunter's</i>			
	note at six months, £.	1423	7	4
	<i>Pardo</i> on <i>Da Costa</i> ,			
	nine ditto, -	733	11	0
	<i>G. Frazer</i> and <i>Co.</i> on			
	<i>Hymen</i> , <i>Cohen</i> , and			
	<i>Co.</i> , fourteen do.	474	0	0
2d March 1799.	<i>Parke</i> on <i>Auguilar</i> and			
	<i>Co.</i> , fourteen do.	1527	13	0
31st October 1797.	<i>Bogle</i> and <i>Jopp's</i> on <i>Jopp</i> ,			
	twenty-seven do.	378	19	7½
31st October 1797.	<i>Do.</i> on <i>do.</i> twenty-			
	seven do. - -	300	0	0
		<hr/>		
		£.	4837	10 11½
		<hr/>		

On the 19th of *August* 1799 *Perfent* and *Bodecker* returned the following answer to Mr. *Cullen*: “We have been duly favored with your letter of the 17th, covering your remittances for 4837 *l.* 10 *s.* 11½ *d.*, which agreeable to your wishes we have discounted; and beg leave to hand you annexed an account thereof, by which you will

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against
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observe there remains 4710*l.* 6*s.* 6*d.* for you to value upon us at three months' date without renewal, which drafts will on presentation meet due honor." On the 26th of *August* Cullen wrote to *Perfent* and *Bodecker* as follows: "I duly received your esteemed letter of the 19th current, and return you my best thanks for its contents. Mr. *John Parke* will draw for the bills you discounted, which please to honor." On the 28th of *August* *Perfent* and *Bodecker* wrote to Cullen as follows: "Your esteemed favour of the 26th instant apprises us, that Mr. *John Parke* has your authority to draw for the bills which we discounted, which draft will meet due honor." On the 21st of *August* the plaintiff drew bills at three months date upon *Perfent* and *Bodecker*, amounting to 4710*l.* 6*s.* 6*d.*, being the amount of the bills sent to them as afore-said, allowing to the plaintiff interest for the three months, and deducting the commission agreed upon: which bills were accepted by *Perfent* and *Bodecker*; but they soon afterwards became bankrupts, and did not pay any of such acceptances. In *September* 1799 *Perfent* and *Bodecker* became bankrupts, having in their hands the several bills received from the plaintiff unnegotiated; and for which the defendants as their assignees in and previous to *May* 1800 received the full amount. Three of the acceptances amounting to 1600*l.* given by *Perfent* and *Bodecker* to the plaintiff were negotiated by him; but in consequence of the bankruptcy of *Perfent* and *Bodecker* they were returned to him dishonored; and he tendered the same, and also the other six bills, amounting to 3210*l.* 6*s.* 6*d.*, which had not been negotiated, to the defendants on the 18th of *September* 1800, previous to the commencement of this action, and demanded payment of the money which they had received upon the bills discounted by the bankrupts

as before stated. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover in this action?

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PARKER
against
ELIASON
and Others.

Wood for the plaintiff. The original bills were only deposited with the bankrupts before their bankruptcy in the nature of a pledge, to secure them up to the extent of their acceptances, which they had lent the plaintiff upon the terms proposed. Then those acceptances not having been paid, the consideration for the deposit failed; and the bills deposited remaining unnegotiated in the hands of the bankrupts and unmixed with the general mass of their property, the assignees had no right to receive payment of them; but having so done, it is money had and received to the use of the plaintiff, whose property in the bills still continued. That the bills were merely deposited as a pledge, and not intended to be discounted or sold in the market, appears by reference to the correspondence. The first letter says, "A friend of mine wishes to place the inclosed bills in your hands, to be allowed permission to draw," &c. "I shall be obliged by your making a calculation of the sum to be drawn for." The intention therefore was, that the plaintiff, in consideration of the security lodged with the bankrupts, might draw upon them from time to time for so much as the bills would cover, deducting their commission, &c. The word *discount* being introduced by the bankrupts in their answer could not alter the nature of the terms on which the deposit was made; but at any rate it meant no more than calculating the amount of the sum for which the plaintiff might draw upon them. The bankrupts' acceptances could not have been taken in exchange for the other bills, because they

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and Others.

would become due long before. Those acceptances have been offered to be returned to the assignees.

Taddy contra. The bills were either transferred to the bankrupts, 1st, on a general banking account; or 2dly, to answer a specific purpose, and reimburse them for their advances to the plaintiff; or 3dly, which is the real nature of the transaction, upon an exchange of property. The circumstance of the bills having been indorsed by the plaintiff to the bankrupts is decisive to shew that he meant to divest himself of the whole property, and not merely to deposit them as a pledge. If the latter only had been intended, there was no occasion to indorse them; for that enabled the bankrupts if they thought fit to negotiate them. The legal effect of the indorsement and delivery of the bills was to pass the property to the bankrupts; and all the cases of deposits (a) shew an agreement between the parties to control the operation of the law in that respect. But here there was nothing in the agreement to prevent the bankrupts' negotiating the bills immediately after they received them. The bankrupts themselves so considered it at the time. They represented the transaction as a discounting of the bills; and that was not denied by the plaintiff. The probability too is on the same side; for the plaintiff was a stranger to the bankrupts at the time; and had no account with them, as in the case *ex parte Dumas*, and in *Tooke v. Hollingworth*; but it was a simple transaction of discounting bills in the market. Supposing there had been no bankruptcy, and the original

(a) *Ex parte Dumas*, 1 Ark. 232. and 2 Ves. 582. *Tooke v. Hollingworth*, 5 Term Rep. 215. and *Zinck v. Walker*, 2 Blac. 1154.

bills had not been paid when due, the only remedy the holders would have had would have been upon the plaintiff's indorsement: then the bankruptcy can make no difference, as was said in *Hollingsworth v. Tooke*, in Error (a). The nature of this transaction is a mere exchange of property; as in *Rolfe v. Caslon* (b); the one set of bills were a consideration for the other. It is true, that here the original bills were at long dates, and would not become due till after the bankrupts' acceptances; but that shews that the former could not have been deposited to answer the latter; because they would not have answered the purpose of putting the bankrupts in cash; and therefore could only have been intended to reimburse them afterwards, like any other case of a discount. Again, if this had been meant as a deposit, the agreement would have been to draw *with* renewals, and not *without*: but the latter makes an end of the transaction, and shews that no further account was intended between the parties. If this be a case of deposit, then every case of a customer putting bills into his banker's hands will be the same; but that was considered otherwise in *Bent v. Puller* (c).

Wood in reply. The indorsing of the bills pledged by the plaintiff cannot make a difference in the nature of the agreement; because that was necessary to enable the bankrupts to receive payment of them in case they complied with the condition of the deposit. Nor is it any objection to consider this as the case of a pledge, because the legal property passed to the bankrupts; for that is the case *pro tempore* of every pledge. In the case put of the bankers, if the bills were paid in by a customer on his

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(a) 2 H. Blac. 503.

(b) Ib. 570.

(c) 5 Term Rep. 494.

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general account, then he could not recover them back in case of a bankruptcy: but it is different where bills are paid in on a specific account; because the bankers have then no right to appropriate them to any other. The effect of the stipulation against a renewal of the bills was no more than an engagement by the bankrupts that they should be punctually paid when due.

Lord KENYON C. J. Some confusion has arisen by supposing that there is a technical sense annexed to the term *discount*, which cannot be gotten rid of; but that is explained by considering the true nature of the transaction. If the bills had been taken to the bankrupts upon a simple proposal to discount them, the transaction would have been merely that of a purchase, and no question could have arisen. But this is nothing like a case of discount; but the bills were placed in their hands to answer a particular purpose. The first proposal to them is to know to what extent the plaintiff might draw on them upon a deposit of the bills. The bankrupts by their answer accept the offer, and specify the amount to which they will honor the plaintiff's drafts at three months' date. If this had been a new case, there might have been as much difficulty in it as there was in the case of *Tooke v. Hollingsworth* (a), which was very fully considered. There was indeed a difference of opinion among the Judges of this court, but a majority thought with the plaintiff, and their judgment was afterwards confirmed in the Exchequer-chamber upon a writ of error. The same principle was afterwards recognized in the case of *Bent v. Fuller* (b), though the conclusion was different upon the

(a) 5 Term Rep. 215.

(b) 5 Ib. 494.

facts there disclosed; and it appeared to me that Mr. Justice *Buller*, who differed from the rest of the Court in the first case, relented a little in the subsequent one. At any rate however the point is now settled, and the distinction clearly ascertained between the case of bills paid into a banker's hands on a running account, and the case of a single transaction like the present, where the deposit is made for a special purpose. Here the bills were deposited for the express purpose of enabling the plaintiff to draw on the parties to a certain amount; and those very bills, having an ear-mark on them which distinguished them from the mass of the bankrupts' property, remained in specie in their possession at the time of the bankruptcy: then shall the assignees be permitted to appropriate them to the use of the bankrupts' estate, when the other acceptances, in consideration of which the deposit was made, have not been paid? The assignees can only take the property of the bankrupts, subject to every equity to which it was liable in their hands; and they having received these bills upon a condition which has failed, it is secundum æquum et bonum that the plaintiff should recover back the value of them. I refer to the principles established in *Tooke v. Hollingworth*, and *Beut v. Puller*, which are plain and intelligible to all men, and I must lean against making any exceptions to them upon nice distinctions, which would serve only to perplex commercial transactions.

GRÖSE J. I consider this as a case of bills placed in the hands of the bankrupts to answer a particular purpose, and that purpose not having been answered, the owner is either entitled to receive back the bills themselves in specie, or to recover from the defendants the produce of them.

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The case of *Tooke v. Hollingworth* decides the present question: and it seems to me that Mr. Justice Buller in *Bent v. Puller* acceded to the doctrine established in the former case. This was one simple unmixed transaction. There was no general account before existing between the parties; nor was it the general case of a discounting of bills. The proposal in the letters is to have *leave to place* the bills in their hands, and, in consideration of that, to have *leave to draw* upon them other bills to a certain amount. The bills deposited were of much longer dates than those given by the bankrupts. And the conduct of the bankrupts shews plainly what they thought of the transaction. For though in distress, yet they never negotiated the bills so deposited, but honestly retained them in specie in their possession at the time of the bankruptcy. The bankruptcy then could not give the assignees more right to dispose of them than the bankrupts themselves had; and the original purpose for which they were deposited not having been answered, the assignees cannot in conscience retain the produce of the bills.

LAWRENCE J. This is to be considered as a case of bills deposited for a particular purpose, and not an exchange of one set of bills for another. The first offer is, “to *place* the bills in your hands.” It is not to *exchange* them for other bills. For this the plaintiff is “to be allowed permission to draw without renewals at two or three months.” The meaning of which was an offer to deposit the bills in question, which had a long time to run, on condition of being permitted, as his convenience required, to draw bills on the bankrupts of a shorter date. And then the writer desires them to calculate to what amount the plaintiff shall have leave to draw upon them.

Then

Then the bankrupts in answer say, that “agreeable to your wishes we have discounted.” But how must that be understood? the desire expressed by the plaintiff was to place the bills in their hands, and to have leave to draw bills of shorter dates, and to know to what extent he might be allowed so to do. When therefore the bankrupts say, that agreeable to their correspondents’ wishes they had discounted, it must be understood that they had accepted of the proposal made to them, and used the latter expression with reference to the calculation of the amount which upon deducting interest and commission they meant to allow to be drawn upon them. The original bills were therefore deposited upon the condition of the plaintiff’s having leave to draw on the bankrupts bills of a shorter date; and that condition not having been complied with, a right of action has accrued to the plaintiff to recover from the assignees the value of the bills which they have received.

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 against
 ELIASON
 and Others.

LE BLANC J. I consider the principle which governs this case as having been fully established in the cases of *Tocke v. Hollingworth* (a), *Bent v. Puller* (b), and *Zinck v. Walker* (c): and though there was a difference of opinion in the former case, yet that was not so much a difference as to the principle itself, as with respect to the application of it to the facts of that case. There does not appear to have been any transaction between these parties previous to the letter of the 17th of August 1799. We have therefore the commencement of the transaction, which enables us to discover better what the parties meant; and there can be no doubt upon that letter what

(a) 5 Term Rep. 215.

(b) Ib. 494.

(c) 2 Blac. 1154.

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against
ELYATON
and Others.

was their meaning. The application was not to sell bills of long date for those of shorter date, but to *place* those long bills in the hands of the bankrupts upon condition of being allowed to draw short bills upon them. And though in their answer they use the term *discount*, yet they assent to the terms of the first letter, and use that word merely as a mode of ascertaining what they were to receive for the accommodation. The bills therefore having been deposited upon a condition, and that condition not having been complied with, and they remaining in specie in the hands of the bankrupts at the time of the bankruptcy, the plaintiff might have brought trover for them against the assignees; but they having parted with them and received the value, this action lies in lieu of the other to recover the bills.

Poslea to the Plaintiff.

Saturday,
June 13th.

STONE qui tam *against* FAREY.

An affidavit of excuse, however slight, for not proceeding to trial, is sufficient to discharge a rule for judgment as in case of a nonsuit, in a qui tam as well as in any other action.

UPON a rule nisi for judgment as in case of a nonsuit for not proceeding to trial, an affidavit of the plaintiff's attorney was produced in answer, assigning as a reason for not going to trial, that he was not enabled to prepare briefs for counsel in time, on account of the plaintiff having been absent on a journey, and not having returned home till the day before the affizes; and therefore he was under the necessity of countermanding notice of trial: and

Best now offered a peremptory undertaking, which

Wilson for the defendant objected to taking, as this was a qui tam action, which the Court would not suffer.

to be kept hanging over the defendant's head upon such an insufficient excuse as this; of which there was no instance in the books, in the case of a *qui tam* action; though in other actions for the trial of rights between the parties such an excuse might be admitted. But

1801.

Strong *qui tam*
against
Ferry.

Lord KENYON C. J. said, that there was no difference to be made in this respect between *qui tam* and other actions; the same rules of practice must govern both. To be sure the excuse offered was slight: but almost any excuse upon affidavit was sufficient upon giving a peremptory undertaking. And he added, that he had heard Mr. Justice *Dennison* say, that he had never known an instance of an application to discharge such a rule on a peremptory undertaking being denied, where any affidavit was offered in excuse.

Wilson then agreed to take a peremptory undertaking to try, and the

Rule was discharged (a).

(a) Vide *Raynes v. Spicer*, 7 Term Rep. 178.

HARMAN *against* TAPPENDEN and fifteen Others.

Monday,
June 15th.

THIS was an action on the case to recover damages, wherein the plaintiff declared, that whereas before and at the time of the committing the grievance after mentioned he held the office of one of the freemen of the company of free fishermen and dredgermen of the manor and hundred of *Faversham* in the county of *Kent*, and deprived from such office sundry great advantages, profits, &c. and whereas *J. Tappenden, W. Lightfoot,*

An action does not lie against individuals for acts erroneously done by them in a corporate capacity, from which detriment happens to the plaintiff; at least not without proof of malice.

C. Thomas,

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against
TAPPENDEN
and Others.

C. Thomas, (defendants,) and T. Sneed since deceased, at the time, &c. held the several offices of steward, foreman, treasurer, and book-keeper of the said company, &c. and the said D. Stephen, J. Ward, (and other defendants,) being freemen of the said company, were jurors at a certain court called a water-court, holden in and for the manor of F. aforesaid, on the 28th July 1798; yet the said J. Tappenden so holding the office of steward, and W. L. so, being foreman, &c. and the said D. S., J. W., &c. being such freemen and jurors as aforesaid, contriving and wrongfully and unjustly intending to injure and damnify the plaintiff, and to disturb and disquiet him in the peaceable and quiet possession, &c. of his said office of a freeman of the said company, and to deprive him of the advantages, profits, &c. belonging and appertaining to him in right of such office, whilst the plaintiff so held and enjoyed his said office, and behaved himself well therein, viz. on the 28th of July 1798, at the said court then holden in and for the said manor, wrongfully, unlawfully, and unjustly, and contrary to the duty of their said several offices, did order and procure to be ordered in and by the said court, that unless certain forfeitures should be paid to the steward of the said court on or before the 4th of August then next, for the use of the lord, &c. the said plaintiff should, and he was thereby ordered to be disfranchised from being a free fisherman, &c. provisionally, during the then ensuing oyster season, and until further order of the said court: by means whereof the plaintiff was wrongfully, unlawfully, and unjustly removed from the said office of a freeman, &c. and disfranchised from being a free fisherman and dredgerman of the said manor, &c. until he was restored as after mentioned, and until the plaintiff on the 23d of April 1799 applied to B. R. for and obtained

tained a writ of mandamus, directed to the steward, &c. of the said company, to restore him, &c. or to shew cause to the contrary thereof, &c. yet *the said steward, foreman, treasurer, &c. and the freemen of the said company*, not regarding the said writ, &c. did not proceed to restore the said plaintiff to the said office of freeman, but in their return to the said writ certified and returned certain causes wherefore they could not, &c. which causes having been adjudged by the said court insufficient in law, such proceedings were thereupon had in the said court, &c. that on the 13th of *November*, 40 *Geo. 3.*, a peremptory writ of mandamus was issued (a), whereby the steward, &c. and freemen of the said company were peremptorily commanded to hold a court, &c. and restore the plaintiff to his said office of one of the freemen, &c.; and the said steward, &c. in their return to the said writ, certified that they had on the 18th of *January* 1800 held a court, &c. and restored the plaintiff to his said office, &c. By reason of all which premises the plaintiff for a long time, viz: from the 4th of *August* 1798 until the 18th of *January* 1800, was deprived of great advantages and profits, &c. which would have arisen to him from his said office, &c. and particularly of a share of the privilege and emolument of laying and keeping oysters upon certain oyster grounds within and belonging to the said manor, &c. and of carrying on and exercising a trade in oysters in common with the rest of the freemen of the said company, which the plaintiff would have received and been entitled to if he had not been so removed, &c. and has also sustained great costs, charges and expences by means of the

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HARMAN
against
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and Others.

(a) That was the case of the *Faversham Company* reported in 8 *Term Rep.* 352. where the constitution of the company is stated, and the grounds on which the peremptory mandamus was granted.

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several proceedings in *B. R.*, and in procuring his restoration to his said office. The second count was nearly similar, the principal difference being that the restoration of the plaintiff to his office was stated to be on the particular day mentioned, without alleging that it was by means of the mandamus; to the plaintiff's damage of 2000*l.*

At the trial before Lord *Kenyon* C. J. at the Sittings at *Westminster* after last *Hilary* term, the plaintiff, in order to shew the damage sustained by him, after proving that he was a freeman of the company, gave in evidence the custom of the company, that certain days are appointed for catching oysters, and the quantity allowed to be caught on each day is divided according to the number of the members belonging to the company, and the shares or flints of such as do not attend are appointed to be caught by certain others of the members, who allow them half the share so allotted to them. Thus if *A.* be absent, and his share be allotted to *B.*, who fishes for him, *B.* is entitled to the whole of his own share, and to half of *A.*'s, *A.* being entitled to the other half. He also proved, the order of amotion, in consequence of which he was prevented from exercising his right of fishing during the whole season. The order was as follows: "At a water-court held the 28th *July* 1798. Whereas at this court *M. Harman* has not paid the fines imposed upon him by a former order of this Court (*a*), and does refuse to pay the same in violation of his oath as tenant of this manor and

(a) See the case of the Company of Fishermen of *Faversham*, 8 *Term Rep.* 352. whereby it appears that every person on his admission into the Company takes an oath to observe the customary laws, and to pay such fines as should be imposed upon him. That in 1748 an order was made by the Company that none of their members should buy or lay any oysters in certain places there mentioned within the manor and hundred or within any creek or bank upon

and hundred, and in direct opposition to the by-laws and orders of this company: it is therefore ordered by this Court, that unless the said fines be paid to the steward of this Court on or before the 4th of *August* next for the use of the lord, &c. he the said *M. Harman* shall be and is hereby disfranchised from being a free fisherman and dredgerman of this manor, &c. *provisionally*, during the ensuing oyster season, and *until further order* of this Court. And it is hereby ordered, that application be made to the Right Hon. Lord *Sondes*, the lord of this manor, &c. to confirm this order of disfranchisement, according to the ancient laws and customs of this company." The plaintiff also gave in evidence the writs of mandamus and returns; and insisted further that he was entitled to the costs and charges he had been put to in prosecuting those proceedings. But Lord *Kenyon* C. J. was of opinion, that as the law had not given costs in this case, as it had in others (*a*), the plaintiff was not entitled to recover: and other objections being taken to the action, a verdict was taken for the plaintiff for nominal damages, with leave to the defendants to move to enter a nonsuit. Accordingly, in the last term,

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against
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and Others.

(*a*) The stat. 9 *Ann. c. 20.* provides that if any issue be joined on such proceedings, (*i. e.* upon traverse of any material fact in a return to a mandamus,) and a verdict be found, &c. or judgment given upon demurrer, or by nil dicit, or want of a replication or other pleading, the party shall recover damages and costs, &c.

or near the Kentish shore, on pain of forfeiting 20s. for every offence to the use of the lord. That Harman in 1796, 7, and 8, laid oysters for his own gain within a bank on the Kentish shore, whereby he incurred three forfeitures of 20s. each. These facts were also referred to in the present case.

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against
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and Others.

The Attorney-General (and with him *Mingay, Bayley Serjt., and Espinasse*) obtained a rule nisi for setting aside the verdict for the plaintiff and entering a nonsuit, or otherwise in arrest of judgment : and stated these objections ; 1st, That the evidence of the order of disfranchisement, which was provisionally for the season, and subject to the further order of the Court, and to the confirmation of *Lord Sondes*, (of which latter there was no proof,) did not support the allegation in the declaration which stated such order without the conditional confirmation required. 2d, That the plaintiff had no individual interest in the profits of the fishery, but only as a member of a partnership, and consequently was not entitled to recover his proportion of such profits in an action at law, but must have recourse to equity. 3d, (Which went in arrest of judgment,) That the costs of the mandamus were not recoverable, not being a case within the statute of *Ann*, nor awarded by the Court in that proceeding. 4th, (which went also in arrest of judgment,) That no action would lie to recover damages against individuals, for acts done by them in their corporate capacity ; & non constat but that all or some of these defendants might have voted against the order of amotion.

The case came on in *Easter* term last, when *The Court* intimated very strong doubts on the last-mentioned ground, how far the defendants were answerable in damages in their private characters for acts done by them in their corporate capacity. And *Lord Kenyon C. J.* said, that he entertained considerable doubt, notwithstanding what was said in *Rich v. Pilkington, Carth. 171.* and *Rex v. Rippon, 1 Ld. Raym. 564.* : and added that he had many years ago moved for a mandamus to the master and fellows of *Wadham college*

college, to compel them to put the college seal to a return which they were required to make, and to which Dr. *Windham* the master had great objection, with respect to the facts agreed upon by a majority to be returned; conceiving that he should thereby make himself individually liable to the consequences: but Lord *Mansfield* overcame his difficulty by an explicit declaration that what he thus did in his corporate capacity could not hurt him in his individual character. *Lawrence J.* expressed the same doubt as to the maintenance of the action on the general ground: and observed, that it should at least have been charged and proved that the defendants in their corporate capacity had tortiously procured these acts to be done by the corporate body. But as it was here stated, it did not appear that these individuals had concurred in the act of disfranchising the plaintiff. The case was then directed to stand over to this term.

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Esleine (and with him *Garroco*, *Gibbs*, *Wood*, and *Kyl*, were to have argued) now proceeded to shew cause, and began by stating the manner in which the right of fishery was exercised, in order to shew that after the quantity to be taken was previously ascertained, each member had an individual right to his separate share so ascertained, and did not hold it in partnership with the rest; and therefore any act which deprived him of the profits of that share was injurious to him alone, and not to the rest; and consequently he might maintain an action against the wrong doers.

Lord KENYON C. J. Have you any precedent to shew that an action of this sort will lie, without proof of malice in the defendants, or that the act of disfranchisement was

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done on purpose to deprive the plaintiff of the particular advantage which resulted to him from his corporate character? I believe this is a case of the first impression where an action of this kind has been brought upon a mere mistake or error in judgment. The plaintiff had broken a by-law, for which he had incurred certain penalties, and happening to be personally present in the court, he was called upon to shew cause why he should not pay the forfeitures; to which not making any answer, but refusing to pay them, the Court proceeded, taking the offence pro confesso, without any proof, to call on him to shew cause why he should not be disfranchised; and they accordingly made the order (a). This was undoubtedly irregular, but it was nothing more than a mistake, and there was no ground to impute any malicious motive to the persons making the order. As to the case of *Rich v. Pilkington* (this case was suggested from the bar) the action was for a false return. It was in truth to ascertain a civil right, and with a view to an ulterior proceeding, namely a mandamus, to establish that right. This action is to recover damages for a loss alleged to have been sustained by the wrongful act of the defendants.

LAWRENCE J. There is no instance of an action of this sort maintained for an act arising merely from error of judgment. Perhaps the action might have been maintained, if it had been proved that the defendants contrived and intending to injure and prejudice the plaintiff, and to deprive him of the benefit of his profits from the fishery, which as a member of this body he was entitled to

(a) These facts appear at large in the *Faverham* Company's case before referred to.

according to the custom, had wilfully and maliciously procured him to be disfranchised, in consequence of which he was deprived of such profits. But here there was no evidence of any wilful and malicious intention to deprive the plaintiff of his profits, or that they had disfranchised him with that intent, which is necessary to maintain the action. They were indeed guilty of an error in their proceedings to disfranchise him, in not going into any proof of the offence charged against him, but taking his silence as a confession. In the case of *Drewe v. Coulton* (a), where the action was against the mayor of *Saltsburgh*, who

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(a) *DREWE V. COULTON*, Launceston Spring Assizes, 1787, cor. Wilson J. This was an action against the defendant as returning officer of the borough of *Saltsburgh* for refusing the vote of the plaintiff, as a burgage tenant, in an election of members to serve in parliament for that borough. The declaration stated the plaintiff's right as a freeholder of a burgage tenement in the borough, and that the defendant, being mayor and returning officer, &c. knowing, &c. and contriving and wrongfully intending to deprive him, &c. obstructed and hindered the plaintiff from giving his vote, &c. And the question was, Whether the owners of burgage tenements in the borough had a right of voting, or whether that right were confined to the freemen of the corporation? The case was very fully argued at the bar by *Lawrence Serjt. Gyles*, and *Dallas* for the plaintiff, and by *Morris, Rolle Serjt. Bond*, and *Cobb* for the defendant.

In the course of the argument,

Wilson J. said; If a justice of peace commit any error within his jurisdiction I know of no case where such an action will lie against him: As if he commit upon evidence which turns out not to be true, and an action of false imprisonment be brought against him, the conviction is conclusive evidence in his favour. As to the case of a revenue officer, he is a mere volunteer, and therefore he is liable for any mistakes he may make. But this is more like the case of a sheriff, who is a ministerial officer. If, for instance, a writ of *habeas corpus* be directed to him, he is bound to act; and when the property is disputed, if he return *nulla bona*, and happen to be mistaken in point of law, he is liable to an action for a false return. He then mentioned the case of

In an action against a returning officer for refusing a vote at an election of members to serve in parliament malice must be proved as well as laid. Semble that charging that the defendant, knowing, &c. and wrongfully intending to deprive plaintiff, &c. hindered him from giving his vote, &c. is a sufficient allegation of malice.

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who was returning officer, for refusing the plaintiff's vote at an election, which was claimed in right of a burgage tenement;

General Burgoyne, which was an action on the statute of King William for a false return against the defendant Mr. Moss as returning officer of Preston, and was tried in the year 1768, at Lancaster, before Bathurst J. It was there contended, that under the determination of the House of Commons (1) all the inhabitants had a right to vote, and therefore that that was presumptive evidence that the defendant had *maliciously* refused to receive the plaintiff's vote. But it appearing that from the time of that resolution till the time of the election the usage had always been conformant to the decision of the returning officer in that instance, without paying any regard to the resolution of the House of Commons, Mr. Justice Bathurst, before whom the action was tried, was of opinion that the evidence did not support malice; and the defendant obtained a verdict.

After the argument was concluded,

Wilson J. said, I am now called upon to give my opinion, but I do not think it ought to be binding in a case which is confessedly new, except as Ashby and White may govern it; though I myself have a strong opinion. This is in the nature of it an action for misbehaviour by a public officer in his duty. Now I think that it cannot be called a misbehaviour unless maliciously and wilfully done, and that the action will not lie for a mistake in law. The case of the brigmaster (2) is in point. In all the cases put the misbehaviour must be wilful, and by wilful I understand, contrary to a man's own conviction. Therefore I think from the opening of the counsel this is not a wilful refusal of the vote. In Ashby and White I do not see any thing in Lord Holt's opinion, as to its being wilful being a necessary ingredient in the action: but afterwards in entering the resolution of the Lords I find that they relied on that ground.

In very few instances is an officer answerable for what he does to the best of his judgment, in cases where he is compellable to act. But the action lies where the officer has an option whether he will act or not. Besides, I think that
if

(1) About 1690.

(2) This and other cases Mr. J. Wilson read from Buller's Ni. Pri. p. 64. It is there said that an action lies against a ministerial officer for *wilful* misbehaviour, as denying a poll for one who is a candidate for an elective office, such as brigmaster, &c.

tenement, *Wilson J.* nonsuited the plaintiff because malice was not proved : and he observed, that though Lord *Holt*

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if an action were to be brought upon every occasion of this kind by every person whose vote was refused, it would be such an inconvenience as the law would not endure. A returning officer in such a case would be in a most perilous situation. This gentleman was put in a station where he was bound to act ; and if he acted to the best of his judgment it would be a great hardship that he should be answerable for the consequences, even though he is mistaken in a point of law.

It was a very material observation by Mr. Gibbs, that the words of the resolution of the House of Lords in *Ashby and White* followed the words of the statute of William III. For if that statute were declaratory of the common law as it purports to be, and an action would not lie at the common law for a false return, unless the return were proved to have been made *maliciously* as well as falsely, it should seem by a parity of reasoning that a person whose vote is refused by a returning officer cannot maintain an action against him, unless the refusal be proved to have been wilful and malicious. And if malice were necessary before the statute by the common law, and since by the statute which is declaratory thereof, to sustain an action for a false return, which includes perhaps the votes of all, it seems equally necessary in an action like the present where the injury complained of is to one only. If, however, on looking into the statute it appears to be an amendment of the common law, this argument will not hold.

I do not mean to say that in this kind of action it is necessary to prove *express* malice. It is sufficient if malice may be implied from the conduct of the officer ; as if he had decided contrary to a late resolution of the House of Commons : there I should leave it to the jury to imply malice. But taking all the circumstances of this case together, malice can in no shape be imputed to the defendant. The plaintiff may have a right to vote ; but that depends upon an intricate question of law, with respect to burgage tenures ; the right itself founded on ancient documents, and usages, and not acted upon for many years. On the other hand, there are three recent decisions of committees of the House of Commons in support of what the defendant has done : these to be sure are not binding ; they may perhaps all be wrong ; but they would naturally lead a person in the situation of this defendant to adopt the same opinion. He might fairly reason thus : that the persons who composed those committees were more likely to form a proper opinion upon the subject than himself ; and that it was better to follow those determinations

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in the case of *Ashby v. White* endeavoured to shew that the action lay for the obstruction of the right, yet that the House

than to decide from his own judgment on a supposed right which had lain dormant for so many years; especially as all the evidence of that right was before the committees when they made their determinations. From these grounds therefore it cannot be inferred that the defendant has acted wilfully and maliciously in refusing the plaintiff's vote; and unless that be so, he is not liable in this action.

But notwithstanding the opinion which I hold, I must say that this is a new case; and I confess that the statute of William weighs strongly with me. If that be considered as declaratory of the common law, it is a confirmation of the case of *Ashby and White*. If so, this is an action maintainable by the common law; otherwise one species of this sort of action is maintainable by the common law, and the other not; but there seems to be no reason for such a distinction: and then in that case the common law requires *malice* to support the action as appears by the statute of King William.

But without determining whether the statute be declaratory of the common law or not; if it be not, this case rests on that of *Ashby and White*. Now all the debates and arguments in that case go upon the *malice*; and all those who have acted on that determination since have considered that the refusal must be wilful and malicious in order to support the action. So far it is an authority. It is true that my Lord Holt did not form his opinion upon that ground; and he has stated the law differently: for he says that, if any person who has a right to vote be obstructed in his right, he may maintain an action against the person so obstructing him. And that opinion has not been directly contradicted by any person. But that refusal was charged to be malicious: and it does not necessarily follow, that if it had not been wilful and malicious in the party that he would have holden that the action lay; however, it may be inferred pretty strongly. Be that as it may, it was not the ground of the decision in that case. And in my opinion it cannot be said, that because an officer is mistaken in a point of law, this action will lie against him. That is indeed the case in criminal actions, for there ignorance of the law will not excuse; but the same rule does not prevail in civil cases. It has also been said that this is not like a case where a burdensome office is thrown upon a man without his consent, wherein he is compellable to act; for that here the defendant has chosen to become a member of a corporation, by which he has put himself in a situation to become a returning officer, and therefore that he is bound to understand the whole law as far as it relates to his

House of Lords, in the justification of their conduct, supposed to be written by the Chief Justice, put it upon a different principle, the wilfulness of the act (a). The declaration in that case was copied from the precedent in *Milward v. Sergeant*, which came on in this court on a writ of error, *Hil. 26 Geo. 3.* for refusing the plaintiff's vote for the borough of *Hastings*. There the charge was, "that the defendant contriving and wrongfully intending to injure and prejudice the plaintiff, and to hinder and deprive him of his privilege of voting, did not take or

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(a) 2 *Lud.* 245.

his public situation, and is answerable for any determination he may make contrary to that law. But I much doubt whether that rule be generally true: and in the present instance I am clearly of opinion that the want of malice is a full defence. However as no notice is taken of this in my Lord Holt's judgment, if my brother Lawrence is seriously of opinion that this action is maintainable without malice proved, I shall recommend it to the other side to consent to have the question put upon the record.

Lawrence Serjt. declining to pledge his opinion as to the point required,

Wilson J. then nonsuited the plaintiff: and no new trial was moved for.

Lawrence Serjt. said at the trial, that the declaration was copied word for word from that in the case of *Milward and Sergeant* a few terms ago, which stood for argument in the King's Bench after a verdict had been obtained against a returning officer for refusing a vote. In that case Lord Mansfield and the Court of K. B. refused to hear any argument unless a distinction could be shown between that case and the case of *Ashby and White*, saying that the question had already been determined by the House of Lords. Upon that occasion Garrow, who was one of the defendant's counsel, said that he thought that there was a very material distinction between the two Cases, and that he meant to argue it on the ground of that distinction; which was that the declaration did allege the act done to have been malicious. But *Ashurst* J. then said, that the distinction was not well founded, for it was laid to be, "wrongfully intending to injure," &c. which was the same as "maliciously" &c. and therefore the plaintiff recovered.

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allow his vote." All which allegations Mr. Justice *Wilson* in the case above alluded to thought were essential to be proved in order to sustain the action.

Per Curiam,

Rule discharged (a).

(a) See the case of *Barnardiston v. Same*, 2 *Lev.* 114. which was an action against the sheriff of Suffolk, charging that the plaintiff *maliciously* intending to deprive him of the office of knight of the shire made a double return. Upon a trial at bar Twyden, Rainsford, and Wyld, Js. held, and so directed the jury, that if the return were made *maliciously* they ought to find for the plaintiff; which they did, and gave him 200*l.* And on motion in arrest of judgment Hale C. J. being in court, he, Twyden and Wyld, Js. held, that forasmuch as the return was laid to be *faiso et malitios; et ea intentione* to put the plaintiff to charge and expence, and so found by the jury, the action lay. Rainsford J. doubted. But notwithstanding this charge of malice judgment was reversed in Cam. Scacc. (vide 3 *Lev.* 30.); and that judgment of reversal affirmed in parliament. (1 *Lutw.* 89. 7 *St. Tr.* 431—452.) Lord C. J. North's first reason against the action was (7 *St. Tr.* 442.) because the sheriff, as to the declaring the majority is *judge*, and no action will lie against a judge for what he does judicially, though it should be laid *falso malitiose et scienter*. This reversal occasioned the passing of the statute 7 & 8 W. 3. c. 7. which gives an action against the returning officer for all false returns *wilfully* made, and for double returns *falsely, wilfully, and maliciously* made.

Monday,
June 15th.

PEACEABLE on the Demise of THOMAS HORN-
BLOWER against THOMAS, JOHN, and SAMUEL
READ and JOHN PIDDUCK.

One tenant in common levying a fine of the whole and taking the rents and profits after words without account for nearly five years is no evidence from whence the jury should be directed (against the justice of the case) to find an ouster of his companion at the time of the fine levied: and consequently the latter may maintain ejectment without making an actual entry.

THIS was an ejectment, tried before *Lawrence J.* at the last summer assizes at *Worcester*, for one-third part of the manor of *Shell, &c.*, upon a demise laid on the 2d of May 1796. On the trial the facts appeared to be these: *Philip Fincher* being tenant for life, remainder to his first and other sons in tail, remainder to his daughters as tenants in common in tail, &c. (who afterwards levied a

fine,)

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fine,) died, leaving three daughters, *Mary*, married to *Thomas Hornblower*; *Ann*, (still living) married to *Nicholas Pearfull*; and *Margaret*, who died unmarried before Mrs. *Hornblower*. *Mary Hornblower* under her marriage-settlement, having a power to dispose of her share of the premises in question, executed it in favour of the right heirs of her husband after her own death, with a power of revocation. She survived her husband, and died on the 9th of *March* 1796. The lessor of the plaintiff claimed as heir at law of her husband, under her appointment. After her death *N. Pearfull* and *Ann* his wife levied a fine of the whole estate, as of *Easter* term 1796, which commenced on the 13th of *April*. It was understood by the plaintiff before the trial that the defendants meant to claim under a deed, or will, or both, of Mrs. *Hornblower*, executed subsequent to the deed of appointment before mentioned; in consequence of which the plaintiff's counsel produced evidence by anticipation, which went decidedly to prove that at the time and long before when the supposed instrument or instruments bore date, Mrs. *Hornblower* was insane, and consequently incapable of revoking the former appointment made by her when in her senses, and making a new disposition of her property. Whereupon the defendants' counsel, saying they were not then prepared to meet that case, stood upon their title derived from the fine operating upon what, they contended, was an adverse possession by *Pearfull* and his wife of the whole estate at the time of the fine levied. As to which it appeared in evidence, that during the life of Mrs. *Hornblower* the whole rent of the estate was paid to *Pearfull* in right of his wife, and that he settled with the other sisters for their shares; excepting once when *Pidduck* the tenant in possession paid the rent to Mr. *Hornblower* in his lifetime in the

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presence of *Pearfall*. And that since the death of Mrs. *Hornblower* and till *Pearfall*'s death, which happened afterwards, the latter alone received the whole rent; and after his death the defendants (the *Reads*) received it; no rent having ever been paid to the lessor of the plaintiff: and no entry was proved to have been made by the latter. That in conversation between his attorney and the defendant *Pidduck*, the tenant in possession, about a fortnight before the trial, the latter said, that he considered the *Reads* as his landlords, to whom since *Pearfall*'s death he had paid his rent, and that he did not hold under the lessor of the plaintiff. And on cross-examination the attorney said, that he had understood from his client, the lessor, that the defendants had said that they claimed as having an exclusive right; but when this was said did not appear. For the lessor of the plaintiff it was insisted at the trial, that no entry was necessary to avoid the fine, he having been tenant in common with *Pearfall* during his life, and after his death with the defendants the *Reads*. That he might elect whether the receipt of rent by *Pearfall* and the defendants should be an ouster or not; and if he were not ousted, the fine would only operate on the title and interest of the defendants. E contra it was insisted that, as the lessor of the plaintiff was never in possession, this case was distinguishable from the common case, where several tenants in common being in possession, one of them levies a fine of the whole. And that here the possession being adverse from the death of Mrs. *Hornblower*, and no entry having been made, the fine was a bar to the plaintiff's recovery. The jury under the judge's direction found a verdict for the plaintiff; and leave was given to the defendant to move to enter a nonsuit, if the Court should be of opinion that an entry was necessary to avoid the fine.

A rule nisi having been obtained for that purpose in the last term,

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Onslow Scijt., *Dauncey*, *Wigley*, *Jervis*, and *Abbott* now shewed cause, and contended that no entry was necessary in this case. It is settled, that a fine levied of the whole estate by one of several tenants in common is no ouster of his companions, and in the case of joint-tenants operates only as a severance of the joint-tenancy. *Ford v. Lord Grey* (a). So in *Smales v. Dale* (b), the entry of one tenant in common shall be taken generally as an entry for his companions as well as himself. The same law holds in the case of coparceners (c);* and in a note from Lord *Nettingham's* MS. to the last edition of *Co. Litt.*, in which it is said, that when one coparcener enters specially, claiming the whole land and taking the whole profits, she gains her sister's moiety by abatement; the note (referring to the case of *Smales v. Dale*) says, "the contrary is held, that one coparcener cannot be disseised without actual ouster, and claim shall not alter the possession." So a perception of profits by one tenant in common alone, without account, is no ouster of another; but there must be an actual disseisin strictly proved. *Fairclaim v. Shackleton* (d). It is true that in *Doe v. Proffer* (e) uninterrupted possession by one tenant in common without account, and without any adverse claim for 36 years, was holden a sufficient bar to his companion; but there the jury had found an actual ouster by presumption from the facts proved. But here no actual ouster can be shewn at the time of the fine levied; and the jury by their verdict have negatived any presump-

(a) 6 *Mod.* 44. and *Salk.* 285.(b) *Heb.* 120.(c) *Co. Litt.* 243. b. and vide *Doe v. Kien* 7 *Term Rep.* 386.(d) 5 *Burr.* 2604.(e) *Crut.* 217.

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tion of the kind. Down to the time of Mrs. *Hornblower's* death, on the 9th of *March* 1796, she was in possession, and there was nothing to shew an adverse possession by *Pearfull* from that time to the 13th of *April* when the fine was levied. In order to make a disseisin, it must not be such a possession which is at the election of the other party to consider so or not (*a*). A fine levied by a tenant for years is no bar without a feoffment. But some act must be done in all cases of a privity of possession to change the nature of that possession before a fine can operate against the owner. *Hunt v. Brown* (*b*), and *Earl Pomfret v. Lord Windfor* (*c*).

Gibbs, and *Williams* Serjt., in support of the rule, insisted that there was evidence that the possession of *Pearfull* was adverse to the lessor of the plaintiff at the time of the fine levied. He was in possession of the whole rent without account, and this has continued down to the present time. Then if this be not evidence of ouster, it will be difficult to say what is so, or where to draw the line. The lessor of the plaintiff himself considered the possession as adverse. He treated the defendant's claim as being derived under an instrument executed by Mrs. *Hornblower* before her death. And therefore whether that were valid or not, at least it shews that the possession was adverse at the time of levying the fine. [*Lawrence* J. observed, that the defendants gave no such instrument in evidence.] The instrument was assumed to exist, and evidence given to invalidate it. The attorney of the lessor of the plaintiff swore, that his client knew from the defendants that the whole was claimed; and admitting this

(*a*) Co. Lit. 330. b. (n. 1.) (*b*) *Salis.* 347. (*c*) 2 *Ves.* 472—481. &c.

conversation to have been after the fine levied, still it serves to explain in what right the defendants then held the possession. All the cases where possession by one tenant in common has been holden to extend to the rest have been where all had once been in possession; but here the lessor was a stranger to the estate, claiming as a purchaser under the deed of appointment, and there never has been any acknowledgment of his title by those in the actual possession of the estate or of the rents. In the case of *Fisher v. Slackton* (a) both parties had been in possession of the rents and profits; and what was very material, on the death of one of the tenants in common, his son was admitted tenant on the court rolls. But the case of *Doe v. Proffer* (b) shews strongly, that though one come in by a rightful possession, yet if he afterwards hold adversely, he shall bar his companion by length of possession. Now the fine operates as much here after five years as the longer possession in that case operated in bar of the ejectment under the statute of limitations. Lord Mansfield there considered, that a denial of title, together with a refusal to account, would be sufficient evidence of an ouster by one tenant in common of another. And they cited 14 *Vin. Abr.* 512. *pl.* 5. *in margine.* *Co. Litt.* 243. *b.* 373. *b.* to shew, that an entry by one claiming the whole is an ouster of his companion. And *Story v. Lord Windfor* (c) to shew, that a fine and non-claim for five years will bar a co-tenant in common.

Lord KENYON C. J. No person is less disposed than I am to accommodate the law to the particular convenience of the case: but I am always glad when I find the strict law and the justice of the case going hand in hand together. The whole of this defence is founded in a most

(a) 5 *Burr.* 2604.(b) *Cowp.* 217.(c) 2 *Atk.* 63; 2.

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unrighteous and fraudulent proceeding; and in order to give effect to it, the legal operation of the fine is insisted upon; and it is asked, if this were not an adverse possession by *Pearfall* at the time of the fine levied, where the line is to be drawn? I have no hesitation in saying where the line of adverse possession begins and where it ends. *Primâ facie* the possession of one tenant in common is that of another: every case and dictum in the books is to that effect. But you may shew that one of them has been in possession and received the rents and profits to his own sole use, without account to the other, and that the other has acquiesced in this for such a length of time as may induce a jury under all the circumstances to presume an actual ouster of his companion. And there the line of presumption ends. In the case of *Doe v. Proffer* Lord *Mansfield* rightly said, that it was not necessary to shew actual force in order to prove an ouster, as by turning a man out by the shoulders; but, as was also observed by Mr. Justice *Ashton*, it may be inferred from circumstances, which circumstances are matter of evidence to be left to a jury. There there was an undisturbed and exclusive possession by one tenant in common for 40 years, which the Court properly held to be sufficient evidence of an ouster to leave to the jury. But no judge could think himself warranted in directing a jury to make such a presumption in this case in order to work the grossest injustice, and in aid of a fraud. What is the case here? During Mrs. *Hornblower's* life *Pearfall* held as tenant in common with her; he received all the rent, but he accounted for her proportion. She died in the month of *March* 1796; the defendants or *Pearfall* having, as is supposed, procured from her at a time when the jury have found her to be insane, an instrument conveying

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conveying this property to them. Then in *Easter* term following, for the purpose of securing the possession of this ill-gotten property, the fine is levied. But *Pearfall* had then done no act which manifested that he held the possession of the whole adversely. The levying of the fine of the whole was no ouster of his companion. About a month intervened between the death of Mrs. *Hornblower* and the levying of the fine. What notice was there to the lessor of the plaintiff at that time that *Pearfall* held adversely, so that he shall be taken to have acquiesced in his title. All the cases mentioned go upon the ground of acquiescence in an adverse holding in order to presume an ouster. In *Fairclaim v. Shackleton* there had been a perception of the rent by one tenant in common alone for 26 years; but the title of the other being admitted, no ouster was presumed. Without an ouster be found by the jury the possession of one tenant in common must be taken to be the possession of all. I do admit that upon the principle of the case of *Lade v. Holford* (a) the jury may from circumstances presume an ouster, and where the fact is so found the legal consequences would ensue. But no judge would advise a jury to make the presumption in this case. Then unless the holding were adverse, there was no occasion for an entry to avoid the fine. Suppose a tenant for years levied a fine, no entry by the landlord would be necessary in order to enable him to maintain an ejectment at the end of the term. In *Taylor d. Atkins v. Horde* (b), Lord *Mansfield* said, that in order to advance justice he would enable the real owner in such a case to consider himself kept out by wrong or not, at his election. So a tenant in common may rely on the possession of his co-tenant as

(a) *Bull. Ni. Pri.* 110.(b) 1 *Burr.* 111—117.

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his own, unless there be an actual ouster in fact, or the jury find it from circumstances. But nothing of that sort is here found; and therefore we may consider the levying of the fine as rightfully and legally done, and intended to operate only on that share of the premises to which the defendants were lawfully entitled.

GROSE J. The question is, Whether there were an adverse possession in *Pearfall* at the time of levying the fine? Now to hold that would be to give effect to a scandalous fraud; therefore I will not presume it. Nothing appears to shew that he had then set up an adverse claim to the whole: nor will I presume that he had, since he must have known that any act done by Mrs: *Hornblower* in a state of insanity was a nullity, under which no title could be derived. So that there is no ground for saying that his possession was adverse at that time, and the jury by their verdict have negatived it.

LAWRENCE J. Whether the defendants claimed under a deed or will of Mrs. *Hornblower* did not appear at the trial; but the plaintiff not knowing which it was, or at what time the supposed instrument was executed, said he should give evidence to shew that for a long period, which at all events covered the time within which either could probably have been executed, she was insane. But the fine was put in, which the defendant insisted was at any rate a bar to the action, as no entry had been made. That point I reserved for the opinion of the Court. Then the plaintiff produced his evidence of the insanity, which was proved most satisfactorily: to which the defendants said, that not being aware of such a case intended to be made, they were not then prepared to answer it, but
would

would rely for the present upon the operation of the fine: but neither the contents of any will or deed were read or offered in evidence. I considered this, as distinguishable from the common case, because the possession of one tenant in common was the possession of another, as the receipt of rent by one is a sufficient receipt by the other to prevent his being barred by the statute of limitations. This was holden in the case of *Coppinger v. Keating* on a writ of error from Ireland, *M. 2. G. 3.* in a case where one of two brothers professing the popish religion entered on the death of his elder brother upon lands of which they were tenants in common, in consequence of the gaveling act, directing that the lands of persons of that persuasion shall descend to all the males according to the custom of gavelkind, and held them for several years until his death; and the Court determined that the son of the elder brother was not barred by the statute of limitations, as the uncle was tenant in common with him under that act, no actual ouster being found. There was no act proved in this case to have been done by *Pearfull* at the time of the fine levied to oust his co-tenant, or to manifest that he held adversely to him.

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LE BLANC J. The question is, whether any act had been done previous to the levying of the fine, to shew that at the time of the fine levied the party in possession claimed adversely to the lessor of the plaintiff, or any circumstances had happened from whence the jury might presume an ouster of his co-tenant? The determination of this case in favour of the lessor of the plaintiff will not break in upon any of the cases, where it has been holden that length of time or receipt of rents by one tenant in common, in exclusion of another, may let in the presump-

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tion by the jury of an actual ouster of his companion. The lessor of the plaintiff was not entitled to any rent till after the death of *Mary Hornblower*, he claiming under an appointment to take place after her death. Up to the time of her death she was entitled, and there is no present to say that she was ousted by *Pearfall*. She died on the 9th (as it now appears) of *March*, and the fine was levied on the 13th of *April*. Then in order to shew an adverse possession within that period, it must either appear that *Pearfall* entered on her death claiming the whole, or that he did some act to shew that he claimed adversely. But there is no evidence of any act done for this purpose, and the only evidence of any adverse claim is what was said by *Comberbatch*, the plaintiff's attorney, on his cross-examination, that in a conversation with his client long subsequent to the levying of the fine, the latter told him that he understood that the defendants claimed the whole; but this is no evidence that they claimed adversely at the time of the fine levied. Therefore the case is no more than this, that one tenant in common, without putting his companion or setting up any adverse claim, levies a fine of the whole in 1796, and afterwards receives all the rent. *Prima facie* the receipt of rent by one tenant in common shall be taken to be for all, and according to the right; and it rests upon him to shew that it was received for himself only. Of this there is no evidence. The levying a fine of the whole by one has been settled to be in itself no ouster of the other: and nothing appears to shew that at the time it was levied *Pearfall* claimed adversely to the lessor. Therefore there was no evidence to leave to the jury from whence to presume an actual ouster at the time of the fine levied.

Rule absolute for entering a Nonsuit.

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RICE against CHUTE.

Tuesday,
Jan. 16th.

THIS was an action for goods sold and delivered, and for money had and received; tried at the last assizes for *Horsbam* before *Heath J.* The plaintiff's demand was for forage supplied by him at different times to the *Hampshire Fencible Cavalry* at *Brighton* from the 15th of *October* 1799 to *May* 1800; and the only question was, Whether the defendant were liable for it? *Reed* the quarter-master of the troop said, that he was appointed by the defendant to be clerk of the troop at the salary of 10*l.* a-year. He proved the amount of the oats delivered by the plaintiff to the use of the troop, and that the oats were delivered according to the orders of the defendant as commanding officer of the troop, the same having been purchased by the witness by the express direction of the defendant. That *Hunt* was the paymaster of the troop for the last two years and a half; and that he the witness had paid the plaintiff several sums by bills on the paymaster. The plaintiff received orders to draw bills on *Hunt*, and was paid at different times by him. The plaintiff and others who supplied the troop were to be paid monthly, but *Hunt* had not paid at all since *October* 1799. The drafts were of this sort: "27th *January* 1800: Two months after date pay *John Rice* or order 316*l.* value in oats by *Alexander Reed*;" addressed to *W. Hunt Esq.* and accepted by him. In the latter end of *October* 1799 the defendant was recruiting at *Basingstoke*, and came to *Brighton* on the 8th of *November* following. The defendant was in *Brighton* for three or four weeks, and was detached to *Arundel* in the *December* of the same year. About 24th *January* the defendant returned, and staid at *Brighton* till his regiment

The captain of a troop for which forage is furnished by the order of a clerk appointed by such captain is not liable in an action for money had and received for such forage, though present with the troop at the time; it not appearing that he had received any money for this purpose from the paymaster, to whom it is issued by Government, and upon whom the captain is entitled to draw for a certain sum regulated by the returns of the preceding month.

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was disbanded. *Hunt* was appointed paymaster in 1797 by the commander in chief. He had been slack in his payments for some time, and at last absconded; which was the occasion of the present suit. The witness had received orders from the defendant to draw bills on the paymaster and on his agent too, which were paid. Evidence was also given of bills drawn by the defendant on the paymaster in favour of various persons who had furnished articles for the troop. At *Brighton* the clerk drew bills as usual for defendant, and received money for a long time after the new regulation (in July 1797 as to the appointment of the paymasters) both from defendant and from the paymaster. The clerk applied twice by letter to the defendant at *Arundel* and *Brighton* for money for the use of the troop. He also proved, that *Hunt* the paymaster was indebted to the defendant in 400*l.*, and the regiment was indebted to *Hunt* in 700*l.* That *Hunt's* credit was so bad that no person would have trusted him for 20*l.* Before the new regulation the colonel appointed the paymaster, and the officers were liable for his deficiencies. By the new regulations the commander in chief appoints the paymaster, and the field officers and captains are no longer responsible. However the same practice continued after as existed before this regulation, namely, that the captains of each troop drew on the paymaster bills for the pay, forage, and quarters of the troop. The two sureties for the paymaster *Hunt* were Colonel *Dacre* and Colonel *Everitt*. For the defendant it was proved, that on the 8th *October* the defendant was recruiting at *Basingstoke*, and remained there till the 3d of *November* following. He was at *Brighton* on the 10th of *November* and on the 24th of the same month. That from 1st of *December* to the 19th of *January* he was with a detachment at *Arundel*.

He

He was there likewise on the 28th of *January*, and staid till the 2d of *February*, and then had leave of absence. He was at *Brighton* on the 1st of *March*. That on the 20th of *February* *Hunt* absconded. That the lieutenant next in command, in the absence of the captain of the troop, signs the accounts and payments, and the pay list, containing the extra food to the horses. On that return the paymaster issues the money. The pay list is the voucher of the last issue. There was a committee of paymasters, whereof the defendant was one, after the absconding of *Hunt* who regulated the accounts. The counsel for the plaintiff, admitting that there was no express undertaking for the payment, contended that he was entitled to recover on the count for money had and received; relying on the state of the paymaster's accounts as proved by *Reed*. The learned Judge directed the jury to find a verdict for the defendant, but they found a verdict for the plaintiff to the extent of his demand. And a rule nisi having been obtained for a new trial,

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Adam and *Marryat* shewed cause, and contended that this case differed from *Myrtle v. Beaver* (a), which was an action of the same kind; for there the defendant the captain of the troop, for which the goods were furnished, was absent from his troop the whole time on duty in another quarter, and another officer exercised the command and gave the orders for the supply. Whereas here the defendant was present in command from time to time, and actually gave the orders to the clerk of the troop whom he had appointed, and whose duty it was to provide the necessary forage. [Lord *Kenyon* observed, that the plaintiff had taken damages for his whole demand, including ar-

(a) Ante, 135.

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articles furnished while the defendant was absent. But the counsel offered to deduct so much as the particular articles amounted to. They then renewed the same arguments as were before urged in the case referred to, in order to shew that the captain or commanding officer of the troop was the person liable to answer such demands: and they added, that the paymaster was no more than the banker to each captain for the appropriated sum for which each was entitled to draw upon him after it was issued by government.

Shepherd Serjt. and *Harrison* contra were stopped by the Court.

LORD KENYON C. J. To be sure this case is different in the respect mentioned from the case referred to. But I cannot conceive how the captain of a troop can be personally responsible for the forage furnished to the troop, whether he have received any money for that purpose or not. It is admitted that the goods were not furnished upon his express undertaking. They were ordered by the clerk, who receives his orders from whatever officer happens to be in the command at the time. But it is notorious to all parties that he does not contract as an individual, but on the behalf of government. And government it appears provides money for this very purpose, which is issued from time to time to the paymaster of the regiment. The parties who furnish the goods know that the money is not to come out of the pocket of the captain of the troop. Then the paymaster not having paid this money over to the defendant, how can we say that the money has been had and received by him to the plaintiff's use, when no money whatever has been received by the defendant.

TENDANT. The consequence is, there must be a new trial.

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Rule absolute (a).

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(a) There was another case of *Rice v Everett*, determined at the same time, which was an action brought by the same plaintiff against the colonel of the same regiment for a wage furnished to his own particular troop. The evidence was in general the same as in the other case. But here it appeared that though the defendant had not drawn upon the paymaster of the regiment for the particular sum in demand, and so he could not be said to have received that sum to the plaintiff's use, yet the defendant being indebted to the paymaster on the balance of his own private account with him to the amount of two thirds of the plaintiff's demand, and being a co surety for the paymaster to Government, and the paymaster having absconded in a state of insolvency, the Court refused to set aside a verdict recovered by the plaintiff for the amount of his debt, as the defendant was liable in some shape or other for the paymaster's default, and justice had upon the whole been done by the verdict.

The KING against JOHN GILBERT.

Wednesday,
June 17th.

AN indictment charged that the defendant on, &c. at, &c. did engross and get into his hands by buying of and from divers persons unknown a great quantity of fish, geese, and ducks, to the intent to sell the same again; to the evil example, &c. and against the peace, &c., and being removed by certiorari into this court, the defendant demurred generally, and objected, amongst other matters, that no quantity was specified of the several articles charged to be engrossed.

Indictment for engrossing a great quantity of fish, geese, and ducks, held bad, without specifying the quantity of each.

Wood (being called upon to support the indictment) referred to *R. v. Tracy*, 6 *Mod.* 32. where it was said by *Powell J.* that an indictment for engrossing *magnam quantitatem frumenti* was holden good; and this is recognized in *Hawt.* c. 80. s. 22. *Sed*

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Per Curiam. There are many authorities (a) to shew that this form of indictment is bad: it includes several things, as fish, geese, and ducks, without ascertaining the quantity of each.

Gurney in support of the demurrer.

Judgment for the Defendant.

(a) *Cro. Car.* 581. *Arton.* an indictment for engrossing *magnam quantitatem straminis et sœni* was quashed, for not mentioning how many loads of each. So for selling *diversas quantitates* of beer. *R. v. Gibbs*, 1 *Str.* 497. and *vide* 2 *Hawk. ch.* 25. f. 74.

Wednesday,
June 17th.

THE KING against MUNDAY and Others.

The objects of a charitable foundation in the actual occupation of the alms-house and lands for their own benefit in the manner prescribed by the rules of the institution, and liable to be dismissed for any breach of such rules, are liable in respect of such occupation.

JOHN MUNDAY and several others named appealed to the quarter sessions of the county of *Essex* against a rate made for the relief of the poor of the parish of *Felsed* in that county. The Sessions confirmed the rate, subject to the opinion of this Court on the following case:

Richard Lord Rich having founded a corporation in the parish of *Felsed* in the county of *Essex* for the relief of the poor there, called *chaplains, parochians, and wardens of Felsed*, and having endowed them with certain lands for that purpose, and for the support of a school therein, by indenture dated the 27th of *September*, 7th of *Elizabeth*, granted to the corporation and their successors a messuage called *Colliers*, situate in *Felsed*, and twenty acres of land, with a wood of four acres in the said parish; and likewise the rectory of *Braintree* in the said county; for certain uses to be declared by the said Lord Rich in a certain indenture. Lord Rich accordingly by indenture dated the

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28th of *December* in the same year, reciting the former deed, and that he had appointed for ever the said messuage for an alms-house, for the only relief, dwelling, habitation, and lodging of five poor, old, weak, impotent, or lame persons, as well men as women, and also for one grave woman to attend them, each to be nominated and placed from time to time by him and his heirs, and there to remain during their natural lives, to the intent that they the said five poor alms-folks for the time being should daily come to church, &c.; ordained and declared, that there should be and continue from time to time in the said messuage five such poor men and women, &c. and one grave woman to attend them, and to prepare their meat and drink, &c.; which said six persons should have freely during their lives their dwelling-chambers and lodging in the said alms-house, with such relief, profit, and necessities, and in manner and form as should be therein declared. It was further declared, that Lord *Rich* and his heirs should be perpetual patrons of the foundation. And that if any of the six persons should die or be justly removed, then Lord *Rich* and his heirs should appoint and place one other man or woman of the sort aforesaid in their place, in manner and form as the persons so dead or removed had possessed or enjoyed: and in default of such appointment by Lord *Rich* or his heirs, the chaplain and churchwardens of *Felsed* for the time being should appoint for that turn only. It then gave the patron, upon report of the chaplain or churchwardens, a power of removal in certain cases of misbehaviour, or in case of wilful wasting of the property, or conveying it away, or upon marriage, or keeping any children in the said house. And further it was declared, that the said five poor alms-folk and woman attendant should possess, enjoy, and use from time to

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time for ever, by the sufferance and permission of the said chaplain, parochians, &c. such several lodgings in the said alms-house freely and quietly as to every of them from time to time were appointed by the patron, &c.; and also should possess, use, and enjoy all together, by the said permission, the hall, kitchen, buttery, cellars, barns, &c. and all profits and commodities to the said alms-house belonging. And that the said chaplain, parochians, &c. should from time to time permit the said five poor folk, &c. to have, hold, use, possess, and enjoy their several dwellings, and the said hall, kitchen, &c. and all other the said profits, and also further to have, occupy, and use the said two crofts, pastures, tythe hay, and the said wood specified in the said deed of the said 27th September, 7th of *Elizabeth*, with such kine and cattle, with the increase of the same, as the said five poor alms-folk, &c. for the time being should bring up upon the same, in manner and form as Lord *Rich* should order; and also should permit the said five, &c. for their fuel, to be spent in the said alms-house for their relief, as well to bake, &c. and to prepare meat, &c. and other necessities convenient for their relief; to take, cut down, and carry away to the said alms-house for the causes aforesaid, to their use and profit yearly, one rood of the said wood called *Ensfeld's Wood*, to be spent only on the said alms-house; and also to lop, crop, and shred the trees growing in or upon the premises, without felling any oaks, ashes, &c. or other trees above the growth of 25 years, except they be rotten, without hindrance, let, or interruption of the said chaplain, parochians, &c. Lord *Rich* also ordained, that the said five poor folk for the time being (or in their default, the said chaplain, parochians, &c. out of their wood) should yearly fence and preserve the said rood of wood, to be so called and

and carried away, at their own proper costs and charges. Lord *Rich* also gave to the said five poor folks and woman six good kine, to be used and employed to and for their relief, (out of which the stock was to be kept up for ever,) by the advice of the chaplain and wardens, and of the farmer of the manor of *Felsted* for the time being. And he directed that the said poor folk should yearly sell one cow of the said kine to their only use, profit, and commodity, to be employed to their better and further relief; and also yearly bring up one cow-calf for the increase of their said flock: and further, that the said poor alms-house folks, &c. should be ordered and governed in all things by the advice and consent of Lord *Rich* and his heirs, (or in their default by the chaplain and wardens, &c.) not repugnant to any article, &c. in these presents. And if any of the said poor folks or woman would not be ordered and governed in form aforesaid, they should be removed and put out from his or her room and place, lodging and living, &c. as if the party so refusing were dead. But their several payments of money to them they were to use and dispose of at their own pleasure without control.

The appellants, being such poor, old, weak, impotent, and lame persons, were regularly appointed to the said charity, pursuant to the said deed of the 28th of *December* 1565. The rate in question, dated 16th *December* 1800, was as follows:

Messrs. *Munday, Low, Drakenwood, Hicks, Beeze, and Thorp.*

The Alms-house and Lands.	}	Total Rental	}	£.	s.	d.
				15	0	0

At the time of the rate being made they were in the occupation of the said messuage called *Colliers*, and the said twenty acres of land and four acres of wood ground in *Felsted*, conveyed by the deed of the 27th of *September*,

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7th of *Elizabeth*, and paid a labourer for making hay and cutting their wood, and disposed of both to their own use. They also kept six cows upon the same lands, weaned a calf, and sold a cow every year, according to the directions in the said deed of the 28th of *December*; and of the other calves and of the milk they disposed at their own pleasure. At the time at which the appellants were appointed they were not parishioners of *Felsted*. The premises are of the annual value at which they are rated, and were never rated before. The visitor of the said alms-house has frequently granted additional relief to the said appellants.

Pooley and *Bosanquet*, in support of the rate, contended that the alms-house and lands, being themselves rateable property, were liable by the express provision of the stat. 43 *Eliz. c. 2. f. 1.* to be rated in the hands of the *occupiers*, if any such there were; provided it could be shewn, according to the construction which had been put upon that statute, that the persons rated were in the beneficial occupation of the property on their own account. Lord *Holt* said (a) that "hospital lands were chargeable to the poor as well as others; for no man by appropriating his lands to an hospital could exempt them from taxes to which they were subject before, and thereby throw a greater burthen on his neighbours." In *R. v. St. Luke's Hospital* (b) there was no doubt made but that the property itself was rateable, provided an *occupier*, in the sense before described, could be found. But Lord *Mansfield* shewed, 1st, That the trustees could not be considered as such, because they had no beneficial interest in it, and were mere instruments of conveyance. Nor, 2dly, the

(a) *Salk.* 527.(b) 2 *Burr.* 1053. 1 *Blac.* 249. S. C.

servants attending the hospital, they not having *separate and distinct apartments* assigned to their use, as in the case of *Chelsea Hospital* (a), and other charitable foundations. Nor, 3dly, the unhappy objects of the charity. The same determination was made in the case of *St. Bartholomew's Hospital* (b). And again, in *R. v. Waldo* (c), the defendant, who had placed ten poor children in a house belonging to him, and employed a woman there as a servant to superintend and instruct them, was holden not rateable in respect of such property, inasmuch as he made no profit of the building, but applied it solely to charitable purposes. All these cases went upon one or other of these principles, either that the parties rated were not the *occupiers* of the property, which is necessary within the letter of the statute of *Elizabeth* to make them rateable; or they were not the *beneficial* occupiers, and were therefore not within the spirit of the law: for where no profit is derived from the occupation, it is the same as if there was no occupier. Other cases have been decided on the same principles. The Master and Fellows of *Catherine Hall, Cambridge* (d), were holden rateable for buildings occupied by the servants of the college for their benefit, although that is in truth a charitable foundation. So the lessee of a private building appropriated to be used as a chapel (e), making a profit of it in that shape, was deemed rateable in respect of such profitable use. In like manner, a royal park, though not rateable while in the possession of the crown, yet becomes so in the hands of the ranger (f), by whom it is made profitable. But

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(a) *Vide Eyre v. Smallpater*, 2 Burr. 1059. (b) 4 Burr. 2435.(c) *Cald.* 358. (d) *Cocep.* 79. (e) *Robson v. Hyde*, *Cald.* 310.(f) *Lord Bute v. Grindall and another*, 1 Term Ref. 338.

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stables rented by the colonel of a regiment for their use are not liable to be rated (a), because there are no beneficial occupiers. In *R. v. Hurdiss* (b), however, a master gunner having the exclusive occupation (of all but one room) of a battery-house, though removable at the pleasure of the crown, and so far a stronger case than this, was deemed liable to be rated in respect of such exclusive occupation. And *Ashhurst J.* there said, that if any officer of an hospital hold any part of the hospital lands *for his own convenience* he becomes rateable in respect thereof. In *R. v. Susannah Field* (c), though the defendant was found by the Sessions to be the occupier, yet that was merely as a conclusion of law, which they meant to submit to the judgment of the Court upon the facts stated: and there it appeared that she was merely employed as a servant by the *Philanthropic Society* to superintend the education of the children there; that she had no distinct apartments besides her bed-room, and was not allowed to have any person there with her; that she was removeable at the pleasure of her employers, and in short had no beneficial occupation in her own right, but merely as a servant. But in *R. v. Catt* (d), where it was shewn that a schoolmaster, who had a similar employment under a charitable trust, had the exclusive possession of a house where he and his family resided, and the use of a garden, the Court had no doubt but that he was liable to be rated for them. Now here there is an actual occupation of the property rated by the objects of the charity for their own benefit. They pay the labourer whom they employ, and they dispose of the produce to the best advantage

(a) 2 Term Rep. 372.

(b) 3 Term Rep. 497.

(c) 5 Term Rep. 527.

(d) 6 Term Rep. 332.

for themselves. They manage the property within the limits of the trust reposed in them in the same manner as a tenant does under the term of his lease. If the property were leased to a tenant under the same terms, reserving to themselves the rent, there could be no doubt but that such tenant would be liable to be rated: then the equitable owners must be equally liable if they occupy it themselves instead of receiving the rent. This case is stronger in support of the rate than *R. v. Hurdie*, before mentioned; for these persons are not mere tenants at will; they cannot be turned out without some misconduct or breach of the rules prescribed to them. Each has an exclusive right to his own separate lodging-room, and the rest they hold as tenants in common. There is no more reason in law for exempting them from being rated than the masters and fellows of colleges, which are charitable institutions. It might as well be contended that if any individual held an estate by the gift of another from motives of charity, he would not be liable to be rated for it. No exception of this sort is introduced into the stat. 43 *Eliz.*: and where the legislature intended to exempt this species of property they have done so in terms, as in the land-tax acts in certain cases.

Trower and *Wingfield* contra said, that this was the first instance of an attempt to rate the objects themselves of a charity; and though the express point had never been judicially decided, yet in all the cases which had occurred of hospitals and other charitable institutions, it had been assumed as an incontrovertible position that the poor persons themselves for whose benefit the property was appropriated were not liable to be rated. The non-existence therefore of such a species of rating furnishes a strong argument

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gument against the adoption of it. Then what is there in the present case to distinguish it? The poor persons have indeed separate lodging-rooms; but that was the case of *S. Field (a)*; and every thing else is occupied by them in common, as in all other hospitals and almshouses. They have not an exclusive possession of the land; for if they omit to do what is required by the trustees or the charter of their institution, the trustees are to do it for them. They are liable to be turned out for any misconduct or disobedience of the orders of the patron or trustees, and also for the breach of other positive regulations. It is true that this property falls within the general description of rateable property in the statute 43 *Eliz.*, but there are several necessary exceptions not included in the words of the statute, which have always been admitted, such as lands in the possession of the crown, the sites of hospitals and the like under the superintendence and management of the trustees. Another necessary exception is where such property is managed by the poor objects themselves under the control of the founder or trustees. For the primary object of that statute was to make persons of ability contribute to the necessary maintenance of the poor; therefore where property is altogether devoted to this purpose, it is absurd to require that a part of it should be so appropriated. Persons of this description can never be considered as having that ability to provide for others which the statute was intended to enforce. It is true that such lands in the hands of tenants are rateable, because the occupation of a tenant is necessarily supposed to be a beneficial occupation, and the tax is therefore levied upon his personal gains, and not upon the fund appropriated to the charity. For this

(a) 5 *Term Rep.* 587.

reason it is admitted that the same lands in the hands of the trustees, who themselves derive no profit, are not rateable. Then what difference can there be whether the trustees receive the profits in the first instance and apply them to the relief of the objects of the charity, or whether these latter gather the profits themselves, accountable to the trustees for the due application of them. The benefit is not greater to them in the one instance than in the other; and therefore therating them because they are beneficial occupiers instead of beneficial receivers is a distinction in sound and not in substance. The case of the servants or officers of charitable institutions who have distinct occupation of apartments or lands for their own benefit is very different; for they are not the objects of the charity, and therefore theirs is properly speaking a personal beneficial occupation; and like the case of a tenant the tax is levied upon their individual ability in respect of such benefit, and is not withdrawn from the objects of the charity. But every tax drawn from the poor persons themselves defeats its own object, and must be reimbursed to them again in another form. The case of colleges and other like foundations have no similitude in their objects to charitable institutions for the sustenance of the poor and impotent. They have other more varied and extensive objects, and partake more of the nature of political corporations. They are not appropriations of property in aid of the stat. 43 *Eliz.* like the present institution, or like hospitals, to which this has the nearest affinity. Here it is expressly found that these persons are real objects of charity; and so far from being able to contribute relief to others have stood in need of it themselves beyond what the institution affords them.

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Lord KENYON C.J. The Sessions have told us what the custom has been with respect to rating these persons for the property in question, an inquiry which I should not have thought it material to make: for the only matter we are called upon to decide is, as to the meaning of the statute of *Elizabeth*. Neither is the wisdom or propriety of rating these persons to be considered: nor should I have advised the parish officers to do so; because it is probable that what they take from them in one shape must be returned in another. But the case being here, we can only deal with it as the law has pointed out to us. The words of the statute 43 *Eliz. c. 2.* are general; the rate for the relief of the poor is to be levied upon *every occupier of lands, houses, &c.* There is no exception made of hospital or other lands devoted to charitable purposes: and I was anticipated from the bar in an observation which occurred to me to arise from comparing that statute with the land-tax acts, that where the legislature intended to exempt property of this description, they have done so in the latter in express words. When the statute of *Elizabeth* was passed, poor rates had not grown to that calamitous size which we have seen them reach in our time; and parishes have not been accustomed to draw any aid from small properties: but now contribution is looked for from every species of property liable to be rated, without regard to what has been done before. It is admitted here, that the property itself comes within the general description of rateable property in the statute; and the only question is, Whether these persons can be said to be occupiers of it for their own benefit. Now what does the case state? These persons plough, and sow, and reap, and have every sort of occupation in fact which any other person can have: and all this for their own benefit. If this be not

an occupation within the statute, I know not how far the exemption claimed may extend. Surely the smallness of the benefit cannot constitute an exemption. Suppose an hospital endowed with lands for a certain number of persons who have a provision there. At first perhaps it might only have afforded a small pittance to each of the members. Shall it be said that they were not rateable then, and would only become so when the revenues were increased: where is the line to be drawn? But supposing that in time it afforded an income of 70*l.* or 80*l.* a-year to each individual: shall it be said that they are not bound to contribute any thing, because they derive that benefit from a charitable institution? • Then it is said, that cases have decided that property of this kind is not rateable, because no occupier could be found: but no case has decided, that where persons are found in the actual occupation and having a beneficial enjoyment of it, they are not within the statute.

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GROSE J. It is not the question whether it were wise or meritorious to rate these poor objects; but the overseers have a right to insist that they come within the description of persons liable to be rated by the stat. 43 *Eliz.*; that is, that they are beneficial occupiers of lands and houses; and if they do so, we cannot say that they are not rateable. But it is asked, Where is the case which says that persons who are the objects of a charity are rateable? I could put many cases where they ought to be rated. For instance; suppose a person gave 1000*l.* a-year amongst five persons, who were to be selected as being objects of charity: should they not be rated on that account? I remember when the case of the Burfar of *Catherine Hall* (a) was decided. He

(a) *Rex v. Gardner, Cowp. 79.*

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was contended not to be rateable; but it was determined otherwise. Yet he was an object of charity in one sense, being appointed to a situation in a charitable foundation; and I cannot distinguish upon a question of law between one sort of charitable foundation and another. As to the quantum of the rate, it is a matter for the Sessions to determine.

LAWRENCE J. I am of opinion, that under the circumstances of this case it is a good rate. The distinction has been truly taken upon the cases, that wherever persons have been found in possession of property from whence they derived a benefit to themselves, they have been holden rateable as occupiers. And all the cases which have been decided against the liability to be rated have either been upon the ground that the party rated was not the occupier, or if he were, that he derived no benefit to himself. But it is said, that the objects themselves of a charity, though beneficial occupiers, do not come within the meaning of the stat. 43 *Eliz.*, for that the object of the rate directed to be levied by that statute is for the relief of poor and impotent persons, and consequently it could not be intended to levy the rate upon such. But however the persons rated might have been poor and impotent at the time when they were selected as objects of the charity, yet after their appointment to be members of the foundation they ceased to be of that description of persons, and therefore became rateable in proportion to the property so acquired.

LE BLANC J. The only question here is, whether the Sessions have rated persons in possession of rateable property. There is no doubt but that the property is rateable within

within the stat. 43 *Eliz.* &c.; and without relying on the fact found of these persons being the actual occupiers, I think sufficient appears from the other facts of the case for the Court to say that they are properly to be considered as occupiers. They occupy the property for their own benefit; and whether it be more or less beneficial is not an object for our inquiry. In other cases of this sort the endeavour has been to find out whether the persons rated were in the occupation of the property; or if so, whether they occupied it for themselves or merely as agents or servants for others, deriving no benefit from it themselves. Such were the cases of the hospitals, and such was the case of Mr. *Waldo's* charity; and in the last-mentioned case the Court considered that he was not the occupier. But these persons are in the actual occupation of rateable property; and there is no exemption in their favour in the stat. 43 *Eliz.*: nor is there any case which has decided that persons of this description occupying such property for their own benefit shall not be rated. Therefore whether the benefit be more or less, we must say that they are liable to be rated in respect of the occupation of such property.

Order of Sessions confirmed,

The KING *against* The Inhabitants of ALD-
BOROUGH.

Wednesday,
June 17th.

TWO justices by an order removed *R. Hall*, together with his wife and children, by name, from the parish of *North Walsham* to the parish of *Aldborough*, both in the county of *Norfolk*. The Sessions on appeal confirmed the

meant with him to pay the same rent to the landlord which he had before done, but without any authority from the landlord, (the cottage together with other premises occupied at the same time being 10 l. a year and upwards,) was holden to give the occupier a settlement.

The occupation of a cottage for 40 days by the leave of the former tenant, who then went out, under an agree-

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order, subject to the opinion of this Court on the following case. *Hall* the pauper, being legally settled in *Aldbrough*, rented and occupied a public house in *North Walsham* from the 10th of *October* 1798 till the 12th of *December* 1800, at the yearly rent of 9*l*. On the 10th of *October* 1800, by virtue of an agreement with *Slap*, who was tenant of a cottage in *North Walsham* belonging to *Mr. Barcham*, *Hall* entered and occupied the cottage, which *Slap* then left, to which *Hall* brought part of his furniture, and where he occasionally resided till he was removed. *Hall* agreed to pay the same rent as *Slap* had paid, which was 2*l*. 12*s*. 6*d*. per annum. *Slap* had no authority from *Barcham* to let this cottage, nor did he know any thing of this agreement. *Barcham* was applied to by *R. Hall* on the 3th of *November* 1800, when *Barcham* agreed that *R. Hall* should be tenant of the cottage, provided that one *Money* to whom he had previously agreed to let it did not take it, which *Money* declined; and *Hall* continued in the cottage as tenant to *Barcham*, and was to pay him the same rent of 2*l*. 12*s*. 6*d*. from *Michaelmas* 1800.

Hulton was about to contend in support of the orders, on the ground that the pauper's possession of the cottage was merely as a wrong-doer, by connivance of the former tenant, whose term was expired, and without any authority from the landlord. But

The Court thought the case too clear for argument; and that the pauper gained a settlement by his occupation of more than 10*l*. a-year at the time for forty days. And Lord *Kenyon* said, that nothing appeared of the former tenant's term having expired, and the law gave him

him authority to assign his interest; and the pauper did occupy above 10*l.* a-year.

Dayrell contra.

Both Orders quashed (*a*).

(*a*) Vide *R. v. Netterfield*, 4 Term Rep 258.

The KING *against* The Inhabitants of OVER.

Wednesday,
June 17th.

TWO justices by an order removed *J. Rutter* and *Hannah* his wife from *Hemmingford Abbots* in the county of *Huntingdon* to *Over* in the county of *Cambridge*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on a case, stating, 'That the pauper *Rutter* let himself two days after *Michaelmas* 1799 for a year to *William Dare* of *Over*, at the wages of six guineas; but that being a pensioner of the *East India Company* he was to have two days in each half year to himself, to go to *St. Ives* to receive his pension. He remained in his said service till old *Michaelmas* day 1800, being a *Saturday*, when his master went to him in the field, and asked him if he would stay again. The pauper said he wanted more wages; he should expect seven guineas a year; which his master refused to give. His master then asked him whether he intended to go to *St. Ives'* fair that day? The pauper said he did. He then unyoked his horses and went to the fair, where his master paid him part of his wages. On the next day (*Sunday*) the pauper returned to his master at *Over*: on that day he settled his wages, when his master asked him if he would stay again, which he assented to. The pauper then let himself to *Mr. Dare* again for another year at the wages of six guineas; but

A pensioner of the *East India Company* hiring himself as a servant for a year, with a reservation to himself of two days in each half year when he might go for his pension, cannot gain a settlement by service under such a contract.

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the pauper expressly said he should expect to have the two days in each half year to go to *St. Ives* for his pension as before; which his master consented to. He continued with *Dare* under this second hiring for about eleven weeks, when the pauper was apprehended for a bastard child. His master settled his wages, and the contract for the service was dissolved by mutual consent. The Sessions were of opinion that the pauper's hiring and service with *Dare* at *Over* were effectual to gain him a settlement there.

Bevill, in support of the orders, said, that the Sessions have in effect found that this was a dispensation of the service for the two days, and not an exception in the original contract; and contended that this case was governed by the principle of the militiaman's case (a), who was deemed to gain a settlement notwithstanding an express exception at the time of the hiring that he should be absent on duty for a month. If that were such a reasonable cause of absence, as that the master could not have refused his consent for the party to be absent from his service while engaged on duty in the public service, it seems to be equally reasonable that one who has received a pension for the reward of past services should be at liberty to go and obtain his reward, although he had not stipulated for it: and then the stipulation to do that which the law would otherwise have allowed him to do upon a general contract, without any such exception, will not vary the case or defeat the settlement. Supposing a servant hired himself for a year, reserving liberty to go to church on *Sundays*, that would not be considered as an exception in

(a) *R. v. Winchcombe, Doug. 192.*

the original contract, but a necessary and implied dispensation by law.

Lord KENYON C. J. said there was no colour for contending that the pauper gained a settlement by this hiring and service. The case of the militiaman went altogether upon the ground that the leave of absence stipulated for was no other than what the law would have compelled without any such stipulation. It was part of the public service. No conclusion therefore can be drawn from thence in support of this settlement. Here was an express exception of four days in the year, during which the pauper was not to be under the control of the master. An express reservation of *Sundays* out of the original contract of hiring was considered sufficient in *R. v. Macclesfield* (a) to prevent the gaining of a settlement under it.

Per Curiam,

Both Orders quashed.

Wilson was to have argued against the orders.

(a) *Burr. S. C.* 458.

THE KING *against* The Inhabitants of WANTAGE. *Wednesday, June 17th.*

TWO justices by an order removed *Thomas Smart* from *Wantage* in the county of *Berks* to the parish of *St. Peter* and *St. Paul* in the borough of *Marlborough*, in the county of *Wilts*. The Sessions on appeal quashed the order, subject to the opinion of this Court on the following case. *Thomas Smart* the pauper being settled in the parish of *St. Peter* and *St. Paul* in *Marlborough* was bound apprentice to *Mr. Tuck*, rope-maker in the parish

A master stipulating for 4*d.* out of every 1*s.* of the earnings of his apprentice is no benefit to him within the stat of *Anne*, for which an additional duty is to be paid; being by law entitled to the whole.

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of *St. George's Ratcliff Highway, London*, for the term of seven years, and served there for eighteen months. The indentures were lost; but parol evidence being admitted, it appeared, that the pauper was to find himself in clothes, board, washing, and lodging: that the master was to allow him full journeyman's wages, but was to have fourpence out of every shilling of the pauper's earnings. The indentures were stamped; but no duty was paid for any consideration reserved to the master.

Gibbs and *Conft* were to have argued in support of the order of Sessions.

Rose, contra, intimated that the 4*d.* reserved out of every shilling of the pauper's earnings was a benefit to the master, for which there ought to have been an adequate stamp under the stat. 8 *Ann. c. 9.* and 9 *Ann. c. 21.* But

Lord KENYON C. J. said, it was impossible to argue that a part of the apprentice's earnings reserved to the master was a benefit to him within the meaning of the statute, when by law he was entitled to the whole, and might rather be considered to have given up that part which he did not reserve than to have acquired any thing.

Per Curiam,

Order of Sessions confirmed (a).

(a) Vide *Rex v. The Inhabitants of Leighton*, 4 *Term Rep.* 732.

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HARRIS and another *against* CALVART and another, *Wednesday, June 17th.*
Bail of COOPER.

UPON a rule for the plaintiff to shew cause why the proceedings should not be set aside for irregularity, &c. the facts were that the defendant *Cooper* was sued by original in *London*; and non est inventus being returned to the first capias ad respondendum in *London*, the defendant was afterwards arrested on an alias capias ad respondendum in *Middlesex*, and bail were put in with the filazer in *Middlesex*. Final judgment being afterwards entered in *Hilary* term; and a scire facias sued out in *Middlesex* against *Cooper's* bail, the present defendants;

Where the defendant was sued by original in *London*, the scire facias against the bail must be sued there also; and it does not help the plaintiff who sued out the scire facias in *Middlesex* that the bail had by mistake been put in there.

Barrow objected on behalf of the bail, that the scire facias ought to have been sued out in *London*, where the original action was.

The *Attorney-General* contrà said, that the bail ought not to be permitted now to avail themselves of their own error, the scire facias having been sued out in *Middlesex* because the bail were put in there. But

The Court (after consulting the Master) said the proceedings were irregular. The bail ought to have been put in in *London*; and having been put in in *Middlesex*, it was the same as if no bail at all had been put in, and the plaintiff might have proceeded against the sheriff for that default. The plaintiff therefore has been guilty of an irregularity in having proceeded to judgment before there was in strictness any appearance entered: and at any rate he cannot proceed against the bail upon a scire facias in

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Middlesex which there are no prior proceedings to warrant.

MARRS
and another
against
CALVERT
and another.

Rule absolute (a).

(a) Vide *Wharton v. Masgrave*, Cro Jac. 331. and *Tates v. Plaxton*,
3 Lev. 235.

Thursday,
June 18th.

EDWARDS and Others against SHERRATT.

The defendant a common carrier to and from B. through W. to R. employs distinct boats to carry to and from B. to R. and to and from R. to W. which pats on different days. The plaintiff knowing this, and having corn at W. which is threatened to be seized by a mob, writes to defendant at B. to send a private boat quickly on account of the state of the country, to take the corn to B., to which the defendant not returning any answer, and plaintiff fearing to wait till the day defendant's boat would in the usual course of employment go from W. to B. stops the boat passing by from R. to B., and without disclosing the circumstances to the boatman prevails on him to take the corn on board, and then dispatches him forward in the night, having privately sent orders to open the lock at any time when he should pass. After a verdict for the defendant negating that the corn was delivered in the usual course of dealing as a common carrier; held that the verdict might be sustained, either on the general ground of fraud in the plaintiff, or on the circumstances of the case, furnishing altogether evidence of a tacit stipulation on the part of defendant to do the best he could, but not to be answerable as a common carrier for the violence of the mob; or because it did not appear that the boatman, whose ordinary employment was between R. and B. had authority from the defendant to accept the goods at W. for B., much less to accept them in that manner. Where a plaintiff has closed his case in evidence at the trial, and the defendant has entered on his defence, it is discretionary in the judge whether he will let the plaintiff into other evidence on a collateral point which was not in controversy between the parties, in order to carry a verdict against the merits of the principal question.

THIS was an action of the case, in the common form, against the defendant as a common carrier by water from *Wolverhampton* to *Birmingham*, for negligently carrying a quantity of wheat belonging to the plaintiffs, whereby it was lost, and also upon the money counts; to which the general issue was pleaded. At the trial before *Rooke J.* at the last *Stafford* assizes, it appeared that the wheat in question had been lodged at the warehouse of *Bickley and Co.*, who were wharfingers at *Wolverhampton*, for the use of the plaintiffs who resided at *Birmingham*. The defendant was a common carrier by water between *Birmingham* and *Wolverhampton*, and so on to *Radford*, which lies beyond *Wolverhampton*; but the carriage of goods between *Birmingham* and *Radford*, and *Birmingham* and *Wolverhampton*, was conducted by different boats. During the

late times of scarcity there had been a disposition to riot at *Wolverhampton*; the mob had actually pulled down a corn mill there, and a rumour was spread of their intention to go to the warehouse of *Bickley and Co.*; whereupon their managing clerk wrote a letter to the defendant to send an extra boat for the wheat *as quickly and as privately* as he could on account of the state of the country. He received no answer to his letter; but on *Monday* the 29th of *September* 1800, finding a boat of the defendant's which had been to *Radford* or somewhere beyond *Wolverhampton*, and was then returning empty by the latter place in its way back to *Birmingham*, he caused it to be stopped for the purpose of taking a quantity of the wheat on board; and *Green* the boatman making no objection to the proposal, 166 bags of wheat were put on board for the plaintiffs, and also some flour for a *Mr. Allen* at the same time from the same wharf. The bags were put on board *in open day*; and the wharfinger's clerk gave no particular directions to the boatman: but he had sent *privately* to the lockmen to have the lock ready to let the boat have a free passage *at any time* the boatman chose to go off with the boat; and in fact the boat went away between 8 and 9 o'clock at night on the same *Monday*. It further appeared that the usual days for the defendant's boats to go from *Wolverhampton* to *Birmingham* were *Tuesdays* and *Fridays*: and this was not one of those boats, but used as a common boat from *Radford* to *Birmingham*. There was another boat loaded with corn from the same warehouse which went in company at the same time. Some part of *Allen's* flour arrived safe, for which the defendant charged a freight; but the 166 bags of wheat belonging to the plaintiffs were seized by the rioters at the distance of four or five miles from *Wolverhampton*, and never came to the hands

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hands of the plaintiffs, for which no charge of freight was made, but demurrage was claimed for the time the boat was detained by the rioters, which the plaintiffs refused to pay. The plaintiffs' counsel having closed their case, and the counsel for the defendant having begun to address the jury, the learned Judge, whose opinion was in favour of the defendant, stopped him by stating that impression, and that in his opinion the principal question for the jury to decide was, *whether the bags were put on board according to the usual course of dealing with a common carrier?* The plaintiffs' counsel then for the first time stated, that the defendant had received some money which the snob had paid for the corn seized by them, and which it was contended that the plaintiffs were entitled to recover on the money counts. The learned Judge however was of opinion, that as the plaintiffs had come there to try the question how far the defendant was liable as a common carrier, (and it appearing that there really was no dispute as to the payment of this money, which had been lodged in a banker's hands for the use of the owners whenever they thought proper to claim it,) and that this was only an after-thought to carry a verdict and the costs, the evidence ought not to be admitted in that stage of the cause. Thereupon he directed the jury as before mentioned; telling them that if they thought the goods were put on board out of the usual course of dealing with a common carrier, they ought to find a verdict for the defendant, which they did accordingly. A rule nisi was obtained in last *Easter* term for setting aside the verdict, and granting a new trial, on the ground that a common carrier contracting to carry goods for hire is by law answerable for all damages, unless happening by the act of God or the king's enemies.

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Garrow, Dauncey, and Ryder now shewed cause against the rule. It was a question of fact for the jury whether under the circumstances of this case the wheat was accepted by the defendant as a common carrier. There was a known course of business in which the defendant contracted to carry goods for the public. There were distinct boats which passed at stated times to and from *Wolverhampton* and *Birmingham*, and to and from *Radford* and *Birmingham*: but considering the state of the country at the time, it would not have answered the plaintiffs' purpose to have waited for the regular conveyance. The wharfinger's clerk therefore, who must be taken to be their agent, wrote to the defendant to send an *extra* boat *privately* for the purpose of removing the corn, which was in danger from the mob. This shews that the plaintiffs did not consider that they were dealing with the defendant as a common carrier; for this mode of conveyance was required as a favour; and if the defendant had refused it, no action would have lain against him upon the custom of the realm for such refusal. But before any answer was returned to this proposal, the wharfingers got the consent of a boatman belonging to the defendant to do an act, not within the scope of his ordinary authority, to make use of the defendant's boat, not then employed by him in the course of public carrying from the place where the wheat then was, but out of the usual course of dealing as a common carrier, as the jury have found: and this too done secretly and by night. There was therefore no contract at all between these parties, but certainly not with the defendant as a common carrier. The danger was so great, that the defendant would have been justified in refusing to take the corn at all, much less out of his regular course of dealing. This therefore at most was a special

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special acceptance on the part of the defendant by his servant to do the best he could for the plaintiffs; and therefore he would not be answerable except for any malfeasance or gross neglect of his own.

Gibbs, Benyon, and D. Jones in support of the rule. There was no evidence to shew that the defendant stipulated to take the corn in any other character than as a common carrier. The difference of the day or the difference of the boat cannot vary the question. The goods were conveyed by one of his boats passing by to the ordinary place of its destination. The defendant was a common carrier from *Radford* as well as from *Wolverhampton* to *Birmingham*. The boat was passing by *Wolverhampton* in the usual course of navigation, and it must be taken that the boatman was authorized to take in whatever goods were offered to him to carry in the track which he followed. Suppose the same proprietor drove a coach from *York* to *London* through *Stamford*, and another coach from *Stamford* to *London*, if goods were taken in at *Stamford* by the *York* coach for *London*, it would be no answer to an action against him as a common carrier for the loss of the goods, that he did not contract to take goods from *Stamford* to *London* by the *York* coach as a common carrier, but that there was another coach employed for the particular purpose on another day, by which the plaintiff ought to have sent the goods. Besides, this was not a special contract with the plaintiffs to let them have a boat for the carriage of their goods in particular; but the goods of another person were taken on board in the usual course at the same time. Where a person who is a common carrier receives goods for the purpose of conveying them in the ordinary track of his carriage, it must *prima facie* be taken that he

received them in the character of a common carrier, and it lies upon him to shew that he received them under a special contract: and as there was no evidence of this, the learned Judge was not correct in leaving it as a question to the jury, whether the corn were put on board the boat according to the usual course of dealing with a common carrier. The only questions for the jury were, whether the defendant were a common carrier between *Wolverhampton* and *Birmingham*, and whether he received the goods at *W.* to carry to *B.* The rest was a conclusion of law. And it is against the policy of the law to admit implied exceptions in a contract, where the law imposes a general responsibility. At any rate however, the plaintiffs were entitled to recover on the money count for the value of the corn received from the mob.

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Lord KENYON C. J. The case has a good deal of novelty, and perhaps there are some difficulties in it: but the present impression of my mind is with the defendant. The learned Judge summed up to the jury all the circumstances of the case; and he left it to them to say from those circumstances, whether the corn had been put on board the boat according to the usual course of dealing with a common carrier: and if done out of that usual course, they were to find for the defendant. That I think was a right direction, and that it was properly a question of fact for their decision; and with their decision I am not disposed to find fault. I will not break in upon the law as long ago settled, that a common carrier warrants the safe delivery of goods in all but the excepted cases of the act of God or of the king's enemies. And I lay no stress in this case on the goods being sent from *Wolverhampton* on one day instead of another, or by one boat instead of the

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other which was the common boat. But I rely on the great features of the case; and thus it stands: The plaintiffs had certain agents at *Wolverhampton* with whom this corn was deposited in order to be sent to *Birmingham*. There was a great disposition to riot manifested in the neighbourhood on account of the prevailing scarcity; and the mob had pulled down a corn mill not far distant, and it was understood that they had threatened to come to the warehouse where this corn was deposited. The agents alarmed wrote a letter to the defendant, desiring him to send an extra boat for it as quickly and as privately as he could. No answer was returned to this; but with the impression that the corn was unsafe where it then was, and that it would fall into the hands of the mob, the plaintiffs' agents, finding one of the defendant's boats going by, without any intention of staying at *Wolverhampton* or seeking to take in goods there, stop the boat and prevail on the boatman to take in this corn; and it is afterwards sent away by night in an unusual manner, a person being sent privately to give directions for opening the lock at whatever time the boatman chose to pass. To me there is fraud apparent on the face of the transaction; and that is the main ground on which my opinion proceeds. All the circumstances and urgency of the case should have been disclosed to the boatman at the time, and he should have been asked whether he chose to undertake the risk. Common honesty would have suggested this. For no man in his senses would under these circumstances have taken the corn under a liability as a common carrier. And if the cause had been tried before a jury of merchants at *Guildhall* they would not have hesitated a moment to say, that the whole was a rank fraud against the defendant; and I should have felt myself

bound to tell them that such was my opinion. I think therefore that the learned judge who tried the cause did right: he leaned to the opinion that this was not a transaction in the common course of trade; but he left it to the jury to draw their own conclusion from the evidence: and I am satisfied with their verdict. As to the evidence offered on the money count, it came too late after the plaintiffs had closed their case: and under such circumstances they ought not to be let into the proof.

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GROSE J. This would have been a hard case no doubt to have holden the defendant liable to make good the loss; but still if the jury had drawn a wrong conclusion there must have been a new trial. Two grounds have been made in support of the rule; one, that the defendant was liable on the money count, which I shall at once lay out of the question. I think the judge in the stage of the cause in which it was offered did right in rejecting the evidence. The other ground is, that the judge misdirected the jury in telling them that the question was, Whether the corn had been put on board according to the usual course of dealing with a common carrier. But I think the direction was proper. It is admitted that if it were not the intention of the parties to contract with the defendant as a common carrier, or if there had been a particular stipulation on his part that he should not be liable for the kind of damage which happened, that he would not be liable in this case. Now either this was a case of fraud upon the part of the plaintiffs, which cannot be enforced in an action upon a contract; or it was a contract under such circumstances existing at the time as must necessarily be taken to have included a tacit stipulation that the defendant should not be considered as a common carrier:

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and it was a question for the jury whether the plaintiffs contracted with him in that character or not. But that in effect is the same question as the learned Judge put to them in other words. Then what are the facts? A boatman in the night, out of the common course of his business, not on the usual day, or in the common boat, is induced to take goods on board, under such circumstances as if the defendant had been apprised of them it is clear that he would not have contracted to receive them as a common carrier. It comes therefore either to a question of fraud, or to a question of intention, in what character the defendant contracted. And the jury have found that it was not the intention of the parties to contract with the defendant as a common carrier, but that there was a tacit stipulation under all the circumstances of the case that he should not be answerable for any damage which might arise from the mob, without which no reasonable man would have undertaken for the carriage of the goods. The direction was right, and the verdict is according to the truth and justice of the case.

LAWRENCE J. I think the Judge's direction was right on this ground, that the jury were to decide whether *Green* the boatman acted under the proper authority of his employer when he took the corn on board? And I think the different circumstances of the case shew that he was not so acting. It was his proper duty to receive goods at *Radford* and convey them to *Birmingham*. It does not appear that he was in the habit of stopping at other places by the way in order to take in goods; if it had, that might have been evidence of his having such general authority: but it does not appear that he had such an authority. And at a place where it was not in the usual course of his employment

ment to stop, he stops and takes in goods, which are afterward lost. The only doubt on this part of the case is, that the defendant received freight for other goods which were put on board at the same time; which was evidence to shew that the boatman had such an authority. But still the verdict of the jury may be right, in concluding that the boatman had not an authority to take in goods at unusual times; and to carry in the night, when the risk was much greater than in the day-time; and when in case of a loss of this sort by robbery, the defendant could not recover over against the hundred. It does not appear, therefore, under the circumstances, that the boatman acted under the authority of the defendant in what he did by the procuration of the plaintiffs' agents. Then again, those agents wrote a letter to the defendant desiring him to send a *private* boat for the wheat; he was to send it as privately as he could on account of the state of the country. To this no answer appears to have been returned. That shews that the defendant declined the undertaking to carry the wheat; and he might have sent orders to his agents to that effect. After which, the plaintiffs' agents, without any communication to *Green* of any of these circumstances, stop his boat as it is passing by, and having put the corn on board, send it off in the night in the manner described; and it not appearing that in so doing he acted under the authority of the defendant, I cannot say that the verdict is wrong; especially in a case where it cannot be doubted that the action is a harsh one; the country being in such a state at the time as greatly to increase the risk beyond the ordinary rate of compensation.

LE BLANC J. Two questions have been made; 1st, Whether the question stated were properly left to the jury? 2dly, Whether the Judge did right after a trial on

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the main question and the plaintiffs had closed their case, to refuse to let them in to additional evidence upon a collateral point which the parties did not come to try, and which was only thought of when the plaintiffs found that the Judge's opinion was against them on the main point. Upon the latter ground I have always conceived that it is a matter of discretion in the Judge, after the plaintiff has closed his case and the defendant's counsel has begun his address to the jury, to permit the former to go into a new case. And I see no ground to complain of the exercise of that discretion in the present instance. On the principal ground, whether the fact were properly left to the jury; whether the bags were put on board according to the usual course of dealing with a common carrier: if the boatman on board of whose boat they were loaded was not authorised at the time by the defendant to take goods on board from *Wolverhampton*, then they were not put on board in the usual course of dealing. Now it does not appear that the *Radford* boatman who received them was used to stop at intermediate places to take in goods, or to take up goods at *Wolverhampton* for *Birmingham*, there being another boat employed expressly for that purpose. It does not appear that the defendant ever employed him for that purpose. That brings it to the question, whether *Green* the boatman had any authority to take the goods, which was proper for the consideration of the jury. For though a servant employed to carry goods from one place to another may ordinarily be presumed to have authority to take up goods in the course of his passage through intermediate places; yet where it appears that one servant was employed expressly for the purpose of taking goods from *Wolverhampton* to *Birmingham*, and another with the like employment from *Radford* to *Birmingham*, if the latter take up goods at *W.* for *B.*,
he

he does it without authority, and his master would not be liable. This was a question for the jury to decide under all the circumstances.

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BURROWS *against* WRIGHT and another.

Thursday,
June 18th.

THIS was an action against the hundred on the stat.

1 Geo. 1. st. 2. c. 5. s. 6. for reparation in damages on account of rioters having pulled down in part the plaintiff's dwelling-house; and a second count for beginning to pull down an outhouse. At the trial before *Graham B.* at the last *Nottingham* assizes, it appeared that on the 2d of *September* last in the middle of the day (during a time of scarcity) upwards of an hundred persons assembled together came to the plaintiff's house, who was a baker, and asked if he had any flour; and being answered in the affirmative, they said they would have it at 2 s. a stone. (It being then worth about 5 s.) The plaintiff said he could not afford it at that price; but they insisted on having it; and he not able to resist began to measure it out in small quantities. The rioters then began to break the windows of the bakehouse, and the dwelling-house adjoining thereto, and broke the glass of three windows and also the shutters. Besides which they broke open a warehouse belonging to the plaintiff situate lower down in the same street on the opposite side of the way, in which there was flour. There however they only burst open the lock, and threw about three bags of flour worth 15 l. into the street, from whence it was carried away by some of the mob. They took about ten stone out of the bakehouse, which was sold at the price named by themselves. They also took away some malt and other things. The learned Judge told the jury, that there was no doubt of the unlawful

Where a mob attacked a baker's house and broke the glass and shutters of the windows, and compelled him to sell flour at a price named by themselves below the marketable value, held this was evidence for the jury of a felonious beginning to demolish the house, &c. within the 4th section of the Riot Act; and that the plaintiff might recover for the damage done to the house in an action against the hundred on the 6th section, but not for the value of the flour so sold, that not being consequential to the act of demolition. Nor could he recover for the value of other flour taken and wasted in another warehouse distinct from his dwelling-house on the opposite side of the street, of which the lock only was burst; that not being a beginning to demolish, &c. within the act, with the view with which it appeared to have been done

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ness of the assembly. And as to their beginning to demolish or pull down the dwelling-house, that the glasses of the windows and the shutters if fixed were part of the dwelling-house: nevertheless if they were satisfied that the mob meant to stop there and proceed no further, it might be too much to say that it was a beginning to demolish, &c. within the statute. But if they thought that the mob came with an intention to proceed to further acts of demolition if they could not otherwise effect their purpose, then it was a beginning to demolish, &c. within the meaning of the act; and consequently that the plaintiff was entitled to recover. The jury found for the plaintiff to the amount of all the damage proved.

Clarke and Reader in the last term obtained a rule nisi for setting aside the verdict and granting a new trial, on two grounds; 1. That there was no evidence of an intention in the mob to pull down or demolish the house, although the windows and shutters were broken; the object being evidently to obtain the flour to be sold at a cheaper rate than before, and not to destroy the house. "And they cited *Reid v. Clarke (a)*, where the violence offered to the house was much greater than here; but the occasion being to compel the plaintiff to illuminate his house on the news of a victory, the Court held that not to be a beginning to demolish or pull down, &c. within the statute (b.) But 2dly, at any rate the damages were taken for too much; for the violence done to the outhouse or warehouse (mentioned in the second count) on the opposite side of the street was a distinct act from the other. There was no connection between the two; and there the only evidence

(a) 7 Term Rep. 496.

(b) 1 Geo. 1. s. 2. c. 5.

of force was the bursting the lock; but that could not be said to be a beginning to demolish, &c. within the act. There was no felony committed there; the flour was thrown into the street. These grounds were again enforced in this term.

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The Attorney General and *Vaughan Serjt.* now shewed cause; and insisted that the object of the rioters being to commit a felony in taking the flour from the owner against his consent, and having for that purpose actually committed a breach upon the house, in breaking the windows and shutters, and being only stopped from further violence by obtaining the object of their unlawful pursuit, clearly brought the case within the 4th sect. of the riot act, and consequently enabled the plaintiff to recover within the 6th section. Then with respect to the second objection; all the damage which ensued was consequential to the beginning to demolish, &c. It was one continued act. And they referred to *Wilmot v. Horton (a)*, where it was considered that this branch of the statute was remedial, and that the hundred were liable not only for goods and furniture destroyed in the house at the time of the riotous demolition of any part of the house itself, but that also damages done to the garden at the same time were recoverable. So this was but one beginning to demolish, &c. and not several beginnings.

LORD KENTON C. J. In the case of *Wilmot v. Horton* the damage to the garden was immediately consequential to the pulling down part of the house, and happened in the act of pulling it down. But here the damage done

(a) Cited in *Hyde v. Coggin*, Doug. 701. n. 3.

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at the warehouse on the opposite side of the street was an entire distinct act, not consequential to the other; and it would be carrying the construction of the statute too far to say that a bursting open of a lock upon such an occasion was a beginning to demolish the house. But with respect to the dwelling-house and bakehouse adjoining, the case seems to me to have been properly left to the jury. It was for them to consider *quo animo* the windows and shutters were broken. The case of *Clarke v. Reid* turned on the *quo animo* the act was done. The violence there was to make the party illuminate, and could not have constituted the persons assembled rioters within the 4th clause of the act, which creates the felony. But

All *the Court* thought that the flour which was compelled by the mob to be sold was not a damage which could be recovered by the plaintiff against the hundred. Wherefore

The plaintiff consenting to take his verdict only for the damages done to the house by breaking the windows and shutters, it was agreed that the

Rule should be discharged (a).

(a) Vide *Grisley v. Higginbotham*, post. 636.

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HEARD, Assignee of WATTS a Bankrupt, *against*
WADHAM, Executor of WADHAM.

Friday,
June 19th.

IN covenant, the plaintiff declared, that whereas by a certain deed of agreement made between *Watts* before he became a bankrupt on the one part, and *Wadham* the testator in his lifetime, and *T. Stevens* on the other part, viz. on the 18th of *May* 1792, *Watts*, for the considerations therein mentioned, covenanted that he would, *on or before the 18th of June* then next, grant and convey to *Wadham* and *Stevens*, their heirs, &c. *by such conveyances, ways and means as their (Wadham's and Stevens's) counsel should advise, all the ground, &c. conveyed in fee to him Watts, his heirs, &c. by the trustees of the late J. B.'s estates, together with all buildings, &c. since made thereon; in consideration whereof Wadham covenanted that he and Stephens would pay Watts at or upon the execution of such conveyance as aforesaid 1000*l.* in moieties, and that they, Wadham and Stevens, would out of the first yearly ground-rents which should be reserved in respect of the ground upon any under grants thereafter to be made by them, amounting to the yearly sum of 200*l.* over and above the yearly sum of 142*l.* then payable out of part of the ground to the said trustees, &c. assign and convey to Watts so much of the said ground-rents as should amount to 200*l.* per annum. And by a memorandum, part of the same deed, it was agreed that Wadham and Stevens should, on or before the 24th of June 1794, lay out on the said ground 5000*l.* The declaration then averred, that although *Watts* before his bankruptcy, and the plaintiff *Heard* since, had respectively performed and been ready to perform all things in the said deed on their*

part,

A. covenants that he will on or before a certain day convey to *B.*, by such conveyance as *B.'s* counsel should advise, all the ground before conveyed to him by *C.*, in consideration of which *B.* covenants to pay a certain sum, and reserve certain rents, &c. to *A.* and to lay out a certain sum on the premises; held that *A.* cannot maintain covenant against *B.* without averring such a conveyance, or a readiness to convey to *B.* on or before the day all the land, but that *B.* prevented him by some act or neglect of his. And it is not sufficient to maintain covenant to shew that after the day *B.* accepted a conveyance of ground-rents in lieu of part of the land, and accepted that and the conveyance of the other part in lieu of the conveyance covenanted to be made by *A.*; for this is a substitution of a different agreement by parol, to which the covenant does not apply.

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against
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Conveyances of
parts in fee-farm.

Conveyance to
Lockier and Ste-
vens.

part, &c., yet protesting that *Wadham* the testator had not performed any thing on his part, &c. nor the defendant since, &c., avers that the ground, in the said deed mentioned to have been conveyed in fee to *Watts* by the trustees of *J. B.*'s estates, was by certain indentures of lease and release dated 24th and 25th of *March* 1791, and before *Watts* became a bankrupt, conveyed by the said trustees, &c. to *J. Cornish* and his heirs, in trust for *Watts*; and that afterwards, and before *Watts* became a bankrupt, viz. on 2d of *April* 1791, by eleven several conveyances *Cornish* conveyed and *Watts* confirmed unto eleven several persons and their heirs eleven respective plots of ground, parts of the said ground in the deed of agreement mentioned to have been conveyed to *Watts* by *J. B.*'s trustees, each subject to a rent of 13*l.* 13*s.* reserved thereon to *Cornish* in trust for *Watts*. That afterwards, and before *Watts* became a bankrupt, by certain other indentures of lease and release of the 25th and 26th of *September* 1792, *Cornish*, at the special instance and request, and by the express direction and appointment of *Wadham* deceased granted and conveyed, and *Watts* confirmed unto *J. Lockier*, *T. Stevens*, and *J. Powell*, and their heirs as tenants in common, all the grounds, &c. mentioned in the said deed of agreement to have been conveyed in fee to *Watts* by the trustees of *J. B.*'s estate, save and except so much and such parts thereof as were granted and conveyed away as aforesaid by the said eleven several and respective conveyances, with all buildings and improvements thereon, &c.; and also all those said eleven several and respective yearly rents of 13*l.* 13*s.* reserved thereon, in trust as to the estate of *Powell*, to the use of the said *Lockier* and *Stevens*, and their heirs, &c. as tenants in common. And the plaintiff further says, that the ground mentioned in the said

said deed of agreement to have been conveyed in fee to *Watts* by *Richard* and *Sufanna Lewis* (trustees for *J. B.*'s estate) were by indentures of lease and release of the 1st and 2d of *August* 1791, and before *Watts* became bankrupt, conveyed by *R.* and *S. Lewis* to *Watts* and one *J. S.* their heirs, &c. to the use of the said *J. S.* his heirs, &c. during *Watts*'s life, remainder to *Watts* in fee; that on 12th of *April* 1792 one *Jones* became lawfully possessed of a certain part of the said ground in the said deed of agreement mentioned to have been conveyed in fee to *Watts* by *J. B.*'s trustees for a certain term of years, and also of the residue of the said last-mentioned ground for the residue of a certain other term by way of mortgage for securing the re-payment of money with interest, and on 26th of *September* 1792, before *Watts* became bankrupt, the said *J. S.* and *Watts* conveyed and confirmed to *Wadham* deceased, *T. Stevens*, and *J. Powell* (subject to the aforesaid mortgage terms therein) the said ground in the said deed of agreement mentioned to have been conveyed in fee to *Watts* by *J. B.*'s trustees, &c. to the use of the said *Wadham* deceased, *Stevens*, and *Powell*, and the heirs of *Wadham* deceased and *T. Stevens*, as tenants in common, in trust as to the estate of *Powell*, to the use of *Wadham* deceased and *Stevens*, their heirs, &c. And plaintiff avers, that the said *T. Jones* at all times from the making of the said deed of agreement hitherto hath been and still is ready and willing to grant and convey to *Wadham* and *Stevens*, and their heirs, &c. by such conveyances, &c. as the counsel of *Wadham* and *Stevens*, &c. should advise all the aforesaid estate and interest, and term of years of him *Jones* in the said ground, &c.; but *Wadham* and *Stevens*, in the lifetime of *Wadham* and the defendant, and *Stevens* since *W.*'s death never did, nor did either

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Lewis's part.
*Jones possessed of
 a term by way of
 mortgage.*
*Jones ready to
 convey the term.*

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*Mortgage to
Jones paid off,
and Jones became
a trustee for W.
and S.*

*Conveyances ac-
cepted in lieu of
those covenanted
to be made.*

Breaches.

either of them require *Jones* so to do, or tender any such conveyance to *Jones*, to be executed by him for the purposes aforesaid; and on the contrary *W. and S. &c.* and defendant and *S. &c.* have hitherto waved and relinquished the execution of any such conveyance, &c. That after the said deed of agreement, viz. on 29th of *December* 1792, the mortgage money to *Jones* was paid off, and it was agreed between *Jones*, and *Wadham*, and *Stevens*, &c. that *Jones* should be, and he thereupon became and still is a trustee for *W. and S. &c.* of the said parts of the said ground so possessed by him for the respective residues of the terms aforesaid. And although the said several conveyances so made by the deeds of the 25th and 26th of *September* 1792, and the premises thereby granted and conveyed, were respectively accepted, taken, and received by *Wadham deceased*, *T. Stevens*, *J. Lockier*, and *J. Powell* respectively, in lieu of and as and for the said conveyances and premises so by the said deed of agreement agreed to be granted by *Watts*, &c. as aforesaid, nevertheless *Wadham deceased* or his assigns did not at or upon the execution of such conveyances as aforesaid, or at any other time whatsoever pay, nor has defendant since, &c. paid to *Watts* before he became bankrupt, or to plaintiff as his assignee, the moiety of said 1000*l.* &c. Nor (2dly) have *Wadham* and *Stevens* paid the other moiety, &c. Nor (3dly) though under grants were made, &c. the 200*l.* per ann. was not reserved to *Watts*, &c. Nor (4thly) the 5000*l.* laid out in buildings; nor (5thly) the reserved rent of 142*l.* per ann. been paid; nor have *W. and S.* indemnified *Watts* from the payment of the same, as by the terms of the aforesaid implied covenant they ought to have done, &c. but have suffered a large sum to become in arrear, &c., in consequence of which *Watts* was forced to pay 200*l.* in discharge of part of the arrears,
and

and the goods of the plaintiff as his assignee have since been distrained for the residue, &c. to the plaintiff's damage, &c. Pleas. 1. Non est factum. 2. That *Watts* did not grant or convey, or tender or offer to grant, &c. the said grounds in the said agreement mentioned to *Stevens* and *Wadham* deceased, &c. or to any other person for their use or by their direction, on or before the said 18th of June in the said deed of agreement mentioned, according to the form and effect of his covenant, &c. 3. That although certain deeds dated 25th and 26th of September 1792 were executed by *Watts* and J. S., yet they or either of them did not thereby grant and convey the said ground mentioned in the said deed of agreement, &c. in manner and form as in the declaration is supposed. 4. That no such indenture of release as in the declaration is lastly mentioned was executed. 5. That at the time of making the indentures of lease and release in the declaration last mentioned neither *Watts*, nor J. S., nor T. Jones, nor any other who executed the same indentures, were seised or possessed of a legal estate in fee in the said ground, &c. or of any estate or interest whereby they or either of them could convey the said last-mentioned premises in manner and form as in the declaration supposed to have been granted and conveyed to *Wadham*, *Stevens*, and *Powell*; but that at the time of the making, &c. one T. Coates or some other unknown was seised of and in the said ground, &c. and was a necessary party to the conveying the same, which said person did not convey, &c. 6. That T. Jones is mentioned to be a party to the said indenture of release in the declaration last mentioned, for the purpose of conveying and assigning the term of years there said to have been vested in him, and that *Wadham* deceased required him to execute the same, which he never did

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did. 7. That true it is that the said several indentures of lease and release mentioned of the 25th and 26th of September 1792 were made and executed by *Watts* long after the 18th of June 1792, to wit, on the days mentioned, &c., and that the said indentures were not accepted by *Wadham* and *Stevens* deceased, as and for the conveyances agreed to be made by the said deed of agreement. 8. As to the non-payment of the moiety of the 1000*l.* by *Wadham* deceased, that after the making the said deed of agreement *Watts* became bankrupt, and before the exhibiting the plaintiff's bill, viz. on 26th September 1792, he *Watts* by a certain deed of five parts, between *Watts*, *Cornish*, *Wadham* deceased, *Lockier* and *Stevens*, and *Powell*, did acknowledge to have received the said moiety of the 1000*l.*, and therefrom did release, &c. said *Wadham*, &c. 9. A similar plea as to the other moiety of the 1000*l.* of which and every part thereof *Watts* by another deed did release, &c. *Wadham*, his heirs, executors, &c. 10. Payment of the moiety of 1000*l.* 11. As to the ground-rents to be conveyed and reserved to *Watts*, &c.; that no such under-grants were made by *W.* and *S.* &c. 12. Protesting that no such under-grants were made, &c. averred that no ground-rents exceeding in the whole 142*l.* had been reserved upon such under-grants. 13. Plene administravit. Replication. As to the 2d plea the plaintiff demurred and assigned for cause that the said plea was immaterial and inissuable: and for that it did not state that any conveyances, &c. were advised by the counsel of *Wadham* and *Stevens*, &c. for the conveying of the said ground, &c. or that any such or other deeds or conveyances were tendered to *Watts* for execution on or before the said 18th of June in the said deed of assignment mentioned, or at any other time: on which there was joinder in

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demurrer. To the 5th plea the plaintiff replied, that *Watts* at the time of making the indentures of lease and release in the declaration last mentioned was seised of a legal estate in his demesne as of fee in the ground, &c. mentioned, subject only to the said term of years whereof *Jones* was possessed. To the 6th plea, that *Wadham* deceased did not always require that *Jones* should execute the indenture in the declaration last mentioned in manner and form as defendant had alleged. To the 8th plea, that though it was in the said indenture there mentioned expressed that *Watts* acknowledged to have received the moiety of the 1000*l.*, and therefrom did release *Wadham*, &c., yet he (*Watts*) did not, really and in fact at the time, &c. nor at any time before or since, &c. nor the plaintiff since, &c. receive the said moiety, &c. but the same was still unpaid. To the 9th plea, that though it was by the said indenture there mentioned expressed, that *Watts* did thereby release *Wadham* from the said 1000*l.* in the declaration mentioned, yet that such supposed release was inserted in the said indenture, and the said indenture was executed by *Watts* upon consideration that the said 1000*l.* should be paid previous to or at the time of executing that indenture, in manner in the said deed of agreement mentioned; but the said sum was not in fact paid to or received by *Watts* at the time, &c. nor had *Watts* or the plaintiff at any time since been paid the same or any part thereof, but the same was still wholly due. To the 13th plea, that the defendant has, and at the time of the plaintiff's exhibiting his bill had assets of the testator, out of which the defendant might have satisfied the damages. And upon all the other pleas issues were taken. Rejoinder joined in demurrer to the second plea; and demurred generally to the 8th and 9th pleas; and went to issue on the others.

Rejoinder.

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Laves for the plaintiff admitted that he was estopped by the matters pleaded in the 8th and 9th pleas from recovering the 1000 l.; but as to the second plea, which went to the whole cause of action, he contended that the matter therein contained was no bar to the plaintiff's recovery upon the breach for non-payment of rent. It appears that the defendant is in possession of the plaintiff's estate under the deed of agreement. That plea tenders an immaterial issue, namely, that *Watts* did not convey or offer to convey, &c. on or before the 18th of June. That is not a condition precedent. The conveyance was to be in such manner as the other party's counsel should advise. It lay upon the defendant therefore to point out in what form the conveyance should be made; and the plea should have proceeded to state a tender of such a conveyance to *Watts* and a refusal by him, or at least a demand of some conveyance and a neglect on his part. *Washington v. Burgon, Moor*, 570. 1 *Bac. Abr.* 673. *Rosewell's case*, 5 Co. 19. b. But at any rate the covenantee may waive the condition; and here it is admitted upon the record that the conveyances afterwards made were accepted by *Wadham* and the others in lieu of the conveyances covenanted for by the deed of agreement; and the premises conveyed were taken in lieu of those contracted for. It is said in 2 *Com. Dig.* 342. L. 2. that non-performance of a condition shall be excused if the feoffee accept another thing in satisfaction.

Abbott contra. The cases cited only shew that where there is a covenant to perform a certain thing at a certain time, if performance of another thing or at a different time be accepted in lieu of the other, it is an answer to an action for the non-performance of the thing stipulated for: but they do not shew that an action may be maintained

tained upon the original contract. Here the original contract was abandoned and another substituted in the place of it, upon which the plaintiff may have a remedy of another sort. *Wadham* was not bound to accept under the original contract what he is admitted to have accepted. The bankrupt covenanted on or before a certain day to convey *all* the ground, &c. in consideration of which *Wadham* covenanted to do certain other things; the plaintiff therefore cannot sue on the covenant without shewing that *Watts* performed what he undertook to do. It was not necessary for the defendant to shew that his testator desired a conveyance; but the plaintiff should have shewn that the testator did not name his counsel. *Rawlins v. Vincent, Carth.* 124. In equity indeed a specific performance will sometimes be decreed after the time; but that is where the other party has acquiesced, as in *Pincke v. Curtis*, 4 *Br. Ch. Rep.* 329. [Lord *Kenyon* observed, that the practice of the Court of Chancery was much altered of late years in this respect; for that now that Court would not entertain a bill for a specific performance to compel a vendee to make good his purchase if no conveyance were tendered to him within the time stipulated for by his contract; unless it were shewn that he had waved that stipulation.] The Lord Chancellor admitted in that case that at law the vendor could not bring an action against the vendee for non-performance of the contract without having tendered him a conveyance. But where the time is enlarged by consent the party must sue upon the contract so enlarged. So where the time is enlarged under an arbitration-bond, which limits the award to be made within a given time, the party complaining of the non-performance of the award must bring his action on the subsequent agreement and not on the bond. *Brown v. Goodman*, cited in

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Little v. Holland, 3 Term Rep. 592. But further the bankrupt conveyed a different thing from what he covenanted to do, and in respect of which the testator covenanted on his part. In lieu of part of the premises (the whole of which *Watts* was to convey) he has conveyed some ground rents: and this failure of performance on his part is the more material, as this was ground to be conveyed on a building lease, upon which 5000*l.* was to be expended. A party who covenants to convey a thing must convey it in the same state in which it was contracted for. *Duke of St. Albans v. Shore*, 1 H. Blac. 270. The acceptance of other conveyances than those covenanted for may give the plaintiff another remedy, but not an action on the original covenant to do a different thing. *Cook v. Jennings*, 7 Term Rep. 381. The case of *Luke v. Lyde* (a) was there referred to as shewing the contrary; but that is not so; for the action there was assumpsit (as appears by referring to the record), though the form of action does not appear by the report in *Burrowes*. As to the last breach assigned upon an implied covenant (this was abandoned as untenable).

Lawes in reply rested on the principal ground, that the second plea was no answer to the declaration. The time was not material, as the conveyance was to be such as *Wadham's* counsel should advise, and it lay upon the defendant to shew that the advice was given. The case in *Carthew* 124. is distinguishable from the present; for that was an action on a bond, where the debt was absolute at law on the obligor, and he could only discharge himself by shewing a strict compliance with the condition, which he

(a) 2 Burr. 582, and 1 Blac. Rep. 190.

could not do by shewing that another thing had been substituted in lieu of it. It is no answer to say, that another action lies on the new agreement, for that not being in writing the statute of frauds would avoid it. [Lord Kenyon. Why may not the action lie if the agreement be executed?] At any rate it is no answer by the defendant to an action of covenant, for non-performance, of what his testator was bound to do, to shew that the bankrupt has not done all that he contracted to do, but which the other had waived; although the plaintiff might have been liable for a breach on his part, if it had not been waived. In *Terry and another v. Duntze* (b), the plaintiffs having covenanted to build a house for the defendant and finish it on or before a certain day, in consideration of a sum of money which the defendant covenanted to pay the plaintiffs by instalments as the building proceeded; it was holden, that the finishing the house was not a condition precedent to the paying the money, but that the covenants were independent, and therefore the plaintiffs might maintain an action of debt for the whole sum, though the building were not finished at the time appointed.

LORD KENYON C. J. It is clear that those were not dependent covenants; for the money was payable by instalments during the progress of the work: but it is as clear that these are dependent covenants. I never expected to hear it said that these were independent covenants; where one man agrees to pay a certain sum of money on a given day, and another covenants to convey an estate to him on the same day; can it be contended for an instant, that though the one has not conveyed he may call upon the

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(c) 2 H. Blac. 389.

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other to pay the money. Common sense revolts at such a proposition. It is impossible for the plaintiff to answer the objection made to his recovery in this form. He has covenanted to do certain things which have not been done; but the other party has indulgently accepted something else in lieu of that which he might have insisted upon. The parol agreement so substituted may be sufficient whereon to found an action of assumpsit; but how can it be the foundation of an action upon a covenant under seal, whereby the parties bound themselves to perform a different contract.

GROSE J. The plaintiff cannot maintain an action on the covenant, without shewing a compliance with it on his part.

LAWRENCE J. The conveyance of the estate covenanted to be conveyed is a condition precedent to the plaintiff's right of action; and many cases in the books may be cited to shew, that where one party is to do a certain thing on a certain day, in consideration of which the other party is to do another thing, the party suing for a breach of the contract must shew that he had performed or was ready to perform his part on the day. And all the cases cited where a substitution of one thing for another was admitted were where subsequent to the breach of covenant the covenantee had agreed to accept another thing in satisfaction of his damages, which was an answer to an action for the non-performance of the thing stipulated. I rather think there are cases to shew, that where one covenants to convey by a certain day in such manner as the vendee's counsel shall advise, the vendor must allege that he called on the vendee to name his counsel, and that he went to the vendee's

vendee's counsel and demanded him to point out what conveyance he would have; but that either the vendee would not name his counsel, or that the latter when required would not point out, &c. But here there is a decisive answer on this ground, that the parties came to a subsequent agreement by parol to do a different thing than that which the covenant required; and the plaintiff attempts to maintain an action on the former contract, by proving the performance of that subsequent agreement, and not of the contract declared on. Even if there were no remedy at law on the subsequent agreement, the plaintiff might still go into equity; but I see no objection with respect to the statute of frauds, where the contract has been executed.

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against
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LE BLANC J. At least it was incumbent on the plaintiff to shew that he was ready at the day to have conveyed what he had covenanted to do, and that he had done every thing which lay upon him to do for that purpose, but that the other party had prevented him from doing the act. If that had been shewn, it would have likened the case more to that of *Terry v. Duntz*, in which there was an averment of that kind. But the finishing of the building there could not be a condition precedent to the payment of the money, because part of it was to be paid before the particular day named for the finishing of the work. Here the plaintiff has neither shewn performance on his part at the day, nor any excuse for non-performance on account of any fault of the defendant. He neither states that he had performed his part, nor was ready to have performed it, but was prevented from doing so by some act or non-performance on the part of the vendees.

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Larves then desired leave to amend, admitting at the same time that if the conveyance of the ground-rents were not equivalent to a conveyance of the land under the circumstances, it would not help the plaintiff's case.

Lord KENYON C. J. said, it could not be so considered.

Judgment for the Defendant.

Friday,
June 18th.

GRAHAM *against* SIME.

A covenant to surrender a copyhold to a purchaser, and to make and do all acts, deeds, &c. for the perfecting and assuring the premises of the costs and charges of the seller, is not broken by non-payment of the fine to the lord on the admission of the purchaser; for the fine is perfected by the admittance of the tenant, and the fine is not due till after the admittance.

IN covenant, the plaintiff declared, that whereas by a certain indenture made on the 8th Jan. 1801, between the defendant and his wife *Elizabeth* of the one part, and the plaintiff of the other, reciting a devise of certain copyhold premises to the defendant's wife (then the wife of *J. S.*) for life, remainder to *R. F.* and his heirs; and reciting the death of *J. S.* and the marriage of his widow with the defendant, and that the defendant and his wife had contracted with the plaintiff for the sale of the said copyhold premises, thereby covenanted to be surrendered to him, for the life of *Elizabeth*, for 275*l.*; it was witnessed, that in pursuance of the agreement and in consideration of 275*l.* payable by instalments in the manner therein expressed, the defendant for himself and his wife covenanted with the plaintiff that they at his or her proper costs and charges, at the then next or some subsequent court, &c. at the request of the plaintiff would duly surrender the premises, &c. And it was further covenanted, that the defendant and his wife, and all others claiming any estate, &c. in the premises during the life of *Elizabeth*, should at all times during her life upon the reasonable request,

quest, and at the costs and charges of the defendant and his wife, or one of them, make, do, and execute, &c. all such further and other lawful and reasonable acts, deeds, surrender, and assurances for the more perfect surrendering and assuring, &c. the premises, to the use of the plaintiff during the life of *Elizabeth*, as by the plaintiff or his counsel should be reasonably required, &c. The plaintiff then averred, that though he had paid the money and performed the indenture on his part, yet the defendant and his wife did not at their proper costs and charges at the next court, &c. surrender the premises, although requested; but on the contrary, that though the defendant and his wife did afterwards, on the 11th of April 1801, duly surrender the premises, yet that certain *fines and expenses* became due and payable as *costs and charges* on the surrender, amounting to 5*l.*, which the defendant and his wife refused to pay. 2dly, That the defendant and his wife did not do other reasonable acts, &c. for better surrendering and assuring, &c. as by the plaintiff were reasonably required; but that for better surrendering and assuring, &c. the premises, it became necessary that the plaintiff should be admitted to the premises at the said court, and that a certain fine should be paid to the lord of the said manor on the admission of the plaintiff, &c. amounting to 18*l.*, for making effectual the same: and then the plaintiff averred, that such admission of him took place, and the said fine was due and payable during the life of *Elizabeth*, &c.; but that neither the defendant or his wife paid the said 18*l.* to the lord, &c. on the admission of the plaintiff, although duly requested, &c. as an assurance required, &c. by the plaintiff; and therefore, &c. The plea took issue on the first breach assigned, and demurred to the second breach, because it was not alleged in the declaration that

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the payment of the fine therein mentioned was any act, deed, or assurance necessary or requisite to be made or performed by the defendant, or that the same was a reasonable fine, or that the defendant and his wife had notice of such fine, or that the plaintiff had sustained any damage by the non-payment thereof.

Lambe in support of the demurrer was stopped by the Court.

Espinasse, contra, said, that the intent of the covenant was, that the seller should pay all the expence of the conveyances and acts necessary to make a good title to the purchaser: and that the payment of the lord's fine was part of the assurance necessary to perfect the plaintiff's title. But

The Court, referring to *Hobart v. Hammond*, 4 Co. 28. a. and *Rex v. The Lord of the Manor of Hendon*, 2 Term Rep. 484. said, that no fine was due to the lord till after admittance, and consequently the plaintiff's title was complete before the fine was due.

Judgment for the Defendant.

Friday,
June 19th.

NOWLAN against GEDDES.

To a declaration against one upon joint promises by him and another, whom he avers to be outlawed, a plea of nul tiel record of outlawry is in effect a plea in abatement, for want of parties; and therefore if it conclude in bar, it is bad on general demurrer, and the plaintiff is entitled to judgment quod recuperet, &c.

THE plaintiff declared in assumpsit upon joint promises against the defendant *A. Geddes* and one *George Laing*, "which said *George* was and is now in due manner outlawed," &c. Plea by *Geddes*, after imparlance, that actio non, &c. because there is no such record of the judgment of outlawry against the said *G. L.* in the said declaration

declaration mentioned now remaining in the Court, &c. as the said plaintiff has above in and by his said declaration supposed; and this the said *A. G.* is ready to verify; wherefore he prays judgment if the said plaintiff ought to have maintained his aforesaid action thereof against him the said *A. G.* To this there was a general demurrer, and joinder.

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Lawes, in support of the demurrer, said, that in effect the plea only amounted to this, that another ought to have been sued jointly with the defendant; and therefore the plea ought to have concluded in abatement, and not in bar. For every plea in bar ought to go to the merits; unless where collateral facts pleaded are an inducement to or substratum of the action; and then they may conclude in bar. And it was necessary for the plaintiff to demur, otherwise he would be concluded by the judgment on a plea in bar.

Barrow contra. The plea was properly in bar. The proceedings are by original against two, and the declaration states a joint promise, and yet is against one only: for the demurrer to the plea admits the fact, that there is no record of outlawry against the other. And he referred to *Horner v. Moor* (a), where debt being brought upon a joint bond against one, judgment was arrested. But

All the Court agreed, that as the plea amounted only to a plea in abatement, it was ill to conclude in bar. And by

LAWRENCE J. The demurrer only admits what is properly pleaded; and if the plea should have concluded in

(a) *11 R. M. 24 Geo. 2.* cited by *Ashton J.* in *Rice v. Shute*, 5 Burr. 1614.

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abatement and not in bar, the demurrer does not admit facts not rightly pleaded. Now the plea is in effect, that another joint contractor was not sued, which is a plea in abatement. In the case cited, it did not appear on the face of the declaration that the other joint obligor was outlawed.

LE BLANC J. The admission of the fact by the demurrer cannot vary the case; for supposing the defendant had pleaded that there was a joint promise, (and the present plea is in effect no more,) and the plaintiff had demurred, that would have been equally an admission of the fact, and yet no doubt such a plea must have concluded in abatement.

Et per Curiam. The judgment in this case is not a respondeas ouster, but a general

Judgment for the Plaintiff (*b*).

(*b*) *Vide Wallis v. Sewell*, 1 *Lutw.* 41.

Friday,
June 19th.

GREASLEY against HIGGINBOTTOM and Another.

Where a mob, after beginning to demolish and pull down a house, steal flour therein, or force the owner to sell it at an under price, the value thereof cannot be recovered in an action against the hundred on the 6th section of the riot act

1 *Geo. 1. s. 2. c. 5.* such stealing and robbery being substantive felonies, and not within the offence created by the 4th section of the act. But flour which was spoiled or destroyed at the time of such beginning to demolish, &c. may be so recovered.

THIS was an action on the stat. 1 *Geo. 1. s. 2. c. 5. s. 6.* against the hundred of *Stapleford* in the county of *Nottingham*, for a reparation in damages by reason of the pulling down in part the dwelling-house of the plaintiff by persons unlawfully, riotously, and tumultuously assembled. On the 3d of *September* a mob consisting of more than two hundred persons came in the morning to the plaintiff's house at *Stapleford*, who was a flour-seller

and grocer; and after beating him, and threatening to break the windows and pull the house down, they actually broke the windows of the house and kitchen, cut the iron and staunchions, and broke the window-shutters. They also pulled down a lean-to or little out-house, and tore off the roof of it. This latter was so placed, that when pulled down there was left an opening outwards from the upper chamber of the house, which had communicated as a door-way into the upper part of the lean-to. Out of the lumber-room with which this was connected the mob took a quantity of flour; some of it they sold one amongst another against the plaintiff's consent at their own price (nearly half the value), which they paid to the plaintiff; some was stolen; and some was thrown about and wasted; in all more than two hundred stone. On the part of the hundred it was first objected, that the lean-to was no part of the dwelling-house; which was over-ruled. 2dly, That the facts proved did not amount to the felony described in the 4th sect. of the riot act, viz. that of the persons being unlawfully, riotously, and tumultuously assembled to the disturbance of the public peace, and unlawfully and with force beginning to demolish and pull down the plaintiff's dwelling-house. At the trial *Graham B.* agreed, that in order to make the hundred liable, the acts done by the persons so assembled must amount to the offence described in the 4th section; but he thought the case proved brought them within it. It was also objected, that at any rate the plaintiff was not entitled to recover for any part of the flour which was taken and sold by the mob, but only for the damage done to the house and lean-to, and the flour spoiled in so doing. The jury however, under the Judge's direction, found a verdict for the plaintiff for the several amount

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amount of the damages sustained by him in each respect, making altogether 40*l*.

Clarke and *Reader* in *Easter* term last obtained a rule for the plaintiff to shew cause why the verdict should not be set aside and a new trial had, on the last-mentioned ground of objection; the flour which was stolen, including that which was taken and sold against the will of the owner, being a felony of another description, and not within the meaning of the 4th sect. of the riot act, creating a new offence, and consequently not within the 6th clause, giving a remedy against the hundred for damages occasioned thereby.

Balguy now shewed cause, and said, that though the 4th clause was highly penal, and therefore to be construed strictly, yet the 6th clause on which the action was founded was a remedial law, and ought consequently to receive a liberal construction. And here the damage arose from one continued act, and all flowed from the original violence.

The Court, however, were of opinion that the hundred were only liable for the damage done to the house and lean-to, and for such of the flour as was spoiled or destroyed in doing that damage: but that as to the flour stolen, or, which in effect was the same thing, taken away and sold without the consent of the plaintiff, that being a distinct felony in the offenders, an offence which existed before the passing of the riot act, and not an injury done to the party by beginning to demolish or pull down the house, it was not within the 4th clause of the act, and

consequently not within the clause giving damages against the hundred (a).

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On this, the plaintiff's counsel consenting to remit the damages given for the flour stolen or taken away by the mob and sold, the rule for the new trial was discharged without costs.

(a) Vide *Ratcliffe v. Eden*, *Croep*. 485. *Hyde v. Cogran*, *Dougl.* 699. and *Reid v. Clarke*, 7 *Term Rep.* 496. and *Burrows v. Wright*, *ante*, 615.

The KING against STONE.

Saturday,
June 20th.

THE following conviction on the game laws was removed into this court by certiorari.

Bedfordshire, to wit. Be it remembered that on the 6th of *January* in the 41 *Geo. 3.* at, &c. *T. French*, of, &c. cometh before me, *J. Webster* clerk, one of the justices, &c. and then and there giveth me the said justice to understand and be informed that *T. Stone* of *A.* in the county of *B.* gentleman, within three months then last past, that is, on *Saturday* the 3d of *January* in the 41st year, &c. at *M.* &c. he the said *T. S.* being a person not then having lands or tenements or any other estate of inheritance in his own right or his wife's right of the clear yearly value of 100 *l.* per ann. &c. (and so negativing all the other qualifications of the stat. 22 & 23 *Car. 2.*); nor then being in any other manner qualified or entitled in his own right to keep or use any engine to kill and destroy the game of this kingdom, did keep and use a certain engine

negative of such qualifications must be repeated in the adjudicatory part of the conviction, or whether it be not sufficient to convict the defendant of the offence *as aforesaid*, referring to the previous part of the conviction which sets forth the information in which such qualifications were specified he acted.

If a conviction before a justice of peace on the game-laws state that the defendant was present at the time when the information was read and the witnesses examined; and that when called on for his defence he produced no evidence, and did not require any further time; that is sufficient, without stating that he was previously summoned to answer, &c. *Qu.* Whether it be necessary for the prosecutor to negative by evidence as well as in the information the qualifications of the defendant to kill game? and *Qu.* Whether the negative

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to kill and destroy game called a gun, against the form of the statute, &c.: of which said information, and of the offence therein charged upon him as aforesaid, he the said *T. S.* on the said 5th of *January*, &c. at *M. &c.* had notice. Whereupon the said *T. S.* appeareth, and is then and there on the said 6th of *January*, &c. at *M. &c.* present before me the said justice to answer and make his defence to the said information and the offence therein charged upon him as aforesaid; and he the said *T. S.* having heard the same is asked by me the said justice if he can say any thing for himself, why he the said *T. S.* should not be convicted of the premises above charged upon him in form aforesaid? and the said *Thomas Stone* pleadeth that he is not guilty of the said offence. Nevertheless on the said 6th of *January*, &c. at *M. &c.* two credible witnesses, to wit, *J. C.* of, &c. and *J. W.* of, &c. come before me the said justice in their own proper persons, and before me the said justice, in the presence of the said *T. S.* they the said *J. C.* and *J. W.* being respectively then and there on the same day and year aforesaid at *M. &c.* duly sworn, &c. and depose, &c. (The conviction then set forth the evidence of the witnesses as to the fact of the defendant's having killed a pheasant on *Saturday* the 3d of *January* 1801, in the parish of *M. &c.* but not stating any evidence of the disqualification of the defendant). And thereupon the said *T. S.* being asked by me the said justice if he had any thing to say, or can produce any evidence in answer to the several matters deposed to by the said *J. C.* and *J. W.* as aforesaid, he the said *T. S.* pretends and represents to me the said justice that he the said *T. S.* on the said 3d of *January*, &c. was qualified both in his own right and in right of his wife to kill game, but doth not produce any evidence thereof;

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~~nor that he the said T. S.~~ on the said 3d of *January*, &c. had any lands or tenements or any other estate of inheritance in his own right or his wife's right of the clear yearly value of 100*l.* per ann., or for term of life, or any lease or leases for 99 years, or for any longer term, of the clear yearly value of 150*l.*; nor that he the said T. S. was the son and heir apparent of an esquire, or of other person of higher degree; nor that he was the owner or keeper of any forest, park, chase, or warren, or game-keeper to any lord or lady of or for any manor or manors; nor in any other manner qualified in his own right to keep or use any engine to kill and destroy the game of this kingdom; nor doth he produce any sufficient evidence thereof in answer to the several matters deposed to by the said J. C. and J. W. as aforesaid; ~~nor doth the said T. S. require any further time for that purpose.~~ And thereupon it manifestly appears to me the said justice that the said T. S. is guilty of the offence above charged upon him in and by the said information. Wherefore I the said justice on the said 6th of *January*, &c. at M. &c. on the oaths of two credible witnesses sworn before me as aforesaid, do adjudge him the said T. S. to be guilty of the offence aforesaid; and do thereupon convict him of the same; and do declare and adjudge that he the said T. S. hath forfeited the sum of five pounds for the same offence, to be distributed as the statute in that case made and provided doth direct."

M^r Intoss, on the part of the defendant, objected, 1st, that the conviction does not state that he was duly *summoned*; and that this was not cured by alleging that the defendant was present; for if a man be not apprised beforehand when he shall be called upon to answer a charge, he cannot be prepared for his defence or have his witnesses

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ready. In *Rex v. Heber* (a), an information was returned against a magistrate for convicting one without summoning him, he happening to be present when another person was convicted for the same offence, who had been previously summoned. It was there said to be a most known rule of common justice that no man should be convicted of an offence till he had previous notice given him of the charge. To be sure, in *Rex v. Johnson* (b) it was holden, that appearance cured all defects in the summons; but there the objection went only to the shortness of the summons, it having been issued on the same day on which the defendant was required to appear. In *R. v. Venables* (c) it was ruled that a summons was necessary; but there no appearance was stated. (The Court expressing their opinion, that the appearance of the party, especially as he did not ask for further time, dispensed with the summons, this objection was abandoned.) 2dly, Neither the evidence nor the adjudication negatives the qualifications required by the stat. 22 & 23 Car. 2.; the want of which is of the very essence of the offence. This was holden to be necessary in *R. v. Jarvis* (d). It is true, that the qualifications are here negated in the information; but that alone is not sufficient; for as the information is the ground of the summons, so the evidence is the ground of the adjudication, and the latter cannot go further than the evidence warrants. And though it was said in *R. v. Crowthor* (e), that it had been no where directly decided

(a) 2 Barnard. 34. 77. 101. (when this book was cited Lord Kenyon observed, that Barnardiston was a bad reporter; and that probably, if the conviction itself were looked into, it would appear either that the party was not called upon for his defence, or had not proper time given to him upon request.) Vid. 2 Stra. 914. S. C.

(b) 1 Stra. 261.

(c) Ib. 630. and 2 Ld. Ray. 1498.

(d) 2 Burr. 148.

(e) 1 Term Rep. 125-7.

that the evidence should negative every particular qualification; yet that was not the point in judgment; and at least that imports that there must be some general evidence of disqualification to put the party accused on his defence. But here there is not even general evidence. In *R. v. Wheatman* (a), where the qualifications were negatived by the evidence, but not in the information, *Ashturst J.* said, that the evidence must prove, but could not supply any defect in the information. And in the precedent in *Burn* (b), the evidence negatives every particular qualification. And that form was agreed to be sustained in *R. v. Thompson* (c), and *R. v. Hurtley* (d) there cited; though the Court in other respects did not approve of it.

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Lord KENYON C. J. referred to a MS. note of *The King v. Jarvis* (e), which was taken by the late Lord *Ashturton* when

(a) *Doug.* 345.(b) 2 *Burn's Justice*, tit. *Game*.(c) 2 *Term Rep.* 18.(d) *E. 22 Geo. 3. Cald.* 175.

(e) *R. v. MORICE JARVIS*, Hil. term 30 Geo. 2.—This was a conviction against the defendant upon the game laws. The conviction sets forth, that on 12th October 1754, at Hillerton in the county of Wilts, *A. B.* came before the justices convicting and made information, that the defendant within 3 months, at the parish of *H.* in the said county, had and used a setting dog and setting net, he not being then qualified by the laws of this realm to keep and use, &c. to kill game. The conviction further sets forth that *Webbe*, a credible witness, came to the place aforesaid and made oath, that, &c. (in the words of the information). It then states, that defendant having been summoned and appearing before the justices at *Devizes* in the said county, and the evidence being read to him; and he being asked what he had to say for himself, and saying nothing except denying the fact; therefore the justices adjudge that the defendant was not anywise qualified, empowered, licensed, or authorized to kill and destroy game, or to keep and use dogs and nets to kill and destroy the game, and adjudge him guilty of the offence, and to forfeit the sum of 5*l.* This conviction being brought up by certiorari and put in the paper, and coming on now to be argued,

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when at the bar, and corroborated the report ~~made by James~~
Burrow; in which, he observed, that the Court had given

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Mr. *Gould* against the conviction, objected 1st, The justices have not shewn that they have a jurisdiction; because they have not stated precisely that *Jarvis* had no qualification. The witness swears generally that the defendant was not qualified to kill game: that is not sufficient; but every qualification mentioned in the stat. 22 & 23 Car. 2. ought to be set forth; and the defendant should be adjudged to have none of them: indeed other subsequent qualifications (as being lord of a manor, &c. which is an implied qualification by a latter statute) need not be set forth. *Rex v. Hill*, 1 Lord Ray. 1, 15. In *Blaug v. Needs, Comyns*, 525. a general averment of the defendant's disqualification was considered as not sufficient in a conviction, though well enough in an action. *Rex v. Pickells*, Mich. 19 G. 2. The conviction there was for keeping and using a lurcher. It was objected that there was no averment that defendant was not lord of a manor. *Lee C. J.* said, "He found no instance of that species of qualification being set forth; that all the qualifications mentioned in the statute of Car. 2. must be set forth; but this is not in the precedents, because it is only an implied or argumentative qualification; the others are expressed." 1 Stra. 497. The first objection there is the strong one, upon which I believe that conviction was quashed. This is not a point of form only, but is of substance, and is necessary to give the justices jurisdiction; and therefore must be set forth. 2d, The witness was examined, in the first place, in the absence of the defendant, which was an irregular proceeding. The defendant should first have been summoned, and have had an opportunity to appear; because such examination is ex parte; and when a witness has once sworn a thing he is in a manner bound to abide by it though false, so that defendant cannot cross examine him upon fair terms. And here too, it is to be observed that at the second meeting, when the defendant was convicted, the witness was not sworn again, but his former deposition read; so that there was no opportunity for cross examination on any terms. 3d, It is said that the defendant was not then qualified, three times are mentioned before the conviction; 1st, the time of the offence committed; 2d, the time of the information given; 3d, that of the conviction. To which does *then* refer?

Mr. *Norton* contra. If the Court see that there is an information made, an offence proved, and that the defendant has been heard, or had an opportunity of being heard, they will not be astute in finding flaws. To the 2d objection it has been said the justice should have summoned the defendant before

an express opinion on the very point in favour of the objection now urged. His lordship read the note here subjoined.

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fore he examined the witness. But I apprehend it would have been a stronger objection had he summoned the party to appear without any probable cause. If the defendant had desired an opportunity of cross examining the witness he had a right to it; but it does not appear he desired it, though the witness then attended. The only defence that the defendant made was that he did not commit the fact; he does not claim the qualification. To the first and great objection, the justices have adjudged the defendant expressly to be in no wise qualified, empowered, licensed, or authorized; than which words nothing can be well stronger. In *Rex v. Chandler*, 1 *Ld. Raym.* 581. *Holt C. J.* said, "It is sufficient for the justices to pursue the words of the statute." It was incumbent on *Jarvis*, if he had a qualification, to prove it; the justices were only to expect a charge of the fact committed from the witness examined. For it is almost impossible for a witness to prove that the defendant has not some of the qualifications. As for instance, he must be a herald and well skilled in the laws of precedence to know who at this time is an esquire, or a person of higher degree. To know who is qualified by virtue of this estate a witness must be intimately acquainted with a person's mental. A search must be made with the clerk of the peace before a witness could know who was a game keeper. And, lastly, how can a witness inform himself whether the party he accuses be keeper of a chase, &c.? All these are negatives; the defendant is summoned to prove the affirmative if he can. There are several cases, though not expressly in point, yet applicable by parity of reasoning. In *Rex v. Ford*, 1 *Str.* 555. which was a conviction for keeping an alehouse without licence, it was objected that there was an exception in the act, and, that it should appear he did not fall within it; but the Court held that that exception coming by way of proviso, the defendant should have insisted on it in his own defence. *Rex v. Theed*, 3 *Str.* 608. is in point; for there the exception did not come in by way of proviso, but in the enacting part. But further, it is sufficient if a conviction follow the very words of the statute. The statute of *Queen Anne*, on which this conviction is grounded, has the words "not being qualified according to the laws in being" (or to that purpose); now here are these and stronger words added. In *Q. v. Matthews*, 10 *Mod.* 27. *Vin. Abr.* and *Burn's Justice*, the Court said, it had been enough if the want of qualifications had been alleged generally; but it was holden bad, because some, but not all, were set forth. In *Rex v. Marriott*, 1 *Str.* 66. the conviction was holden bad, because

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Gibbs contra. The information in *Rex v. Jarvis* omitted to negative the defendant's qualifications, and was therefore clearly bad; and what was there said by the Court

the words were the words of the witness; but had they been the words of adjudication of the justices it seems it would have been well. As to the case of *Rex v. Hill*, it is certainly an authority against me as far as it goes; but it is stated so shortly that one can form little judgment from it. The words in that case possibly were the words of the witness, or there might be some other objection not stated. The case in *Comyns*, 525. as far as it goes, is with me; for in an action of debt for the penalty on this act, it is clearly enough to allege the want of qualifications generally. How those two cases are distinguishable I protest I do not see: the reason is the same; the defence is the same in both cases. In *Rex v. Pickells* the conviction was affirmed, though the objection taken was stronger than here. One qualification was omitted, though the others were set forth particularly; and I do not see why that qualification being created by another later law should alter the case. Therefore the point determined in that resolution seems not against us. He was then proceeding to answer the other objection; but the Court told him it would be determined on this; and also told Mr. Gould he need not take the trouble of replying.

Lord Mansfield C. J. If this matter was *res integra*, and open to be gone into by reasoning at large, yet I should think it necessary for the justices to show that the person convicted was an object of their jurisdiction; that is, that he had none of the qualifications mentioned in the statute of Car. 2. For it is a known distinction that what comes by way of proviso in a statute must be insisted on by way of defence by the party accused; but where exceptions are in the enacting part of a law, it must appear in the charge that the defendant does not fall within any of them. But in this case I do not think myself at liberty to go into the question if it were doubtful; for all the cases from the making of the statute are uniform in support of the objection. The judgment in the *Queen v. Mathews* has nothing to do with this case; there is an obiter saying only at best. In *Rex v. Marriott*, the witness swore generally that the person was not qualified; that was holden bad. The witness in this case swears exactly the same; and the justices adjudge on that evidence only. The stream can never go higher than the spring head. *Rex v. Hill* is in point. In the case from *Comyns*, as that was an action, the general averment might be sufficient; because in the examination of the question at the trial the qualification might be gone into.

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Court must be taken with reference to the point in judgment. There can be no difference in the rules of evidence as applicable to proceedings before justices of peace, and before the superior courts; and in actions for penalties it never was deemed necessary for the plaintiff to disprove the defendant's qualifications. It is impossible in the nature of the thing that a prosecutor should be able to prove all those negatives. If the fact constituting the offence be proved, it is sufficient to put the party upon his defence; and he to whom the fact must be best known must prove the affirmative, and shew that he was qualified to

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The Chief Justice, in *Rex v. Pickells*, argued from this as a settled point, *exceptio probat regulam*. Therefore this point seems settled by all the determinations; for which reason I do not enter at large into the question; though if I should do that the exception seems well founded.

Denison J. I thought this question had been at rest; because it is founded on strong reasons and rules of law. There is a known distinction between exceptions in a statute by way of proviso (which need not be set forth) and those in the purview of the act; and to this point there is a very strong case, (*Rex v. Bell*, vide *Fost.* 450.) upon an indictment against a person for having coining instruments in his custody. It was said by Mr Norton, that in a conviction it is sufficient to pursue the words of the act of parliament: but I think that is not so; and there are many cases where it has been ruled otherwise. Among other instances it was so determined in the case of *Rex v. Chapman*, Easter term 28 Geo. 2. upon a conviction of a person for *robbing an orchard*; which the Court held not sufficient; but it ought to have appeared of what, and how, the orchard was robbed, that they might judge whether it were a robbery within the meaning of the 43 Eliz. c. 7.

Foster J. I am of the same opinion. Where negatives are descriptive of the offence, there they must be set forth. The case my brother Denison refers to upon the stat. 8 & 9 W. 3. for having coining instruments in his custody is very strong. I am strongly inclined against the authority of the case in *Comyns* upon the action of debt for the penalty.

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do it. It is true, that in *R. v. Thompson* ^(a) the precedent in *Burn* was sustained; but the Court expressed great dissatisfaction with it, and this point was not in question. It must indeed be stated in a declaration for the penalty, that the defendant "not being a person duly qualified, &c. to kill game," &c. did the act; but it is not necessary for the plaintiff to prove the disqualification; and if not, neither can it be necessary for the prosecutor to prove the like allegation in an information before a magistrate. If the negative of the qualifications were not introduced in the same clause of the act by which the offence is constituted, it would not be necessary even to state those negatives in the information: but that is a mere technical rule of pleading; and it cannot alter the nature of the evidence, whether such matter be introduced in the same or any subsequent clause; it is still only matter of defence, and the affirmative must be proved by the party who wishes to avail himself of it. As to the other objection, the magistrate does adjudge the defendant not to be qualified; for the information charges that he was not qualified in the manner required; and that being read to him, he

(a) On the mention of this case Lord Kenyon C. J. said, One point in that case has always afforded me great dissatisfaction; namely, that the Court would in any case intend that the evidence was given in the defendant's presence, without its so appearing on the face of the conviction. Mr. Justice Buller, unadvisedly as I think, in that case held that the form of conviction there pursued was well enough, because the precedent in *Burn* was in the same form. I am very sorry that that was ever acquiesced in by me (1). I have often thought since that there is sound sense in what was once said by the late Lord C. J. Eyre, that the sooner a bad precedent was gotten rid of the better.

(1) Vide *R. v. Lovett*, 7 Term Rep. 153. and *R. v. Swallow*, 8 Term Rep. 284.

denies it, and pleads not guilty to the whole; then the fact being proved, and he pretending to be qualified, but giving no evidence of it, as it was incumbent on him to do, the justice adjudges him guilty of the offence *aforesaid*; which therefore refers to the offence as charged in the information.

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Lord KENYON C. J. The first objection is fairly gotten rid of. Justice requires that a party should be duly summoned and fully heard before he is condemned; but if he be stated to be present at the time of the proceeding, and to have heard all the witnesses, and not to have asked for any further time to bring forward his defence, if he had any, this at all times has been deemed sufficient. On the other point there is much weight in the objection. The case of *The King v. Jarvis* was decided above forty years ago: and at that time Mr. Justice *Dennison* thought that the question had been long at rest; and Lord *Mansfield* said, that it had been settled by such a train of authorities that he did not think himself at liberty to go into the question: and he referred to the case of *The King v. Marriott*, where the witness only swearing generally to the want of qualification of the defendant was holden not to be sufficient. No comparison can be made between summary proceedings on a conviction before magistrates, and actions in the courts of common law. In the former it is incumbent upon the magistrates to shew expressly that they had a jurisdiction in the particular instance; and they have no jurisdiction to convict unless the defendant had none of the qualifications mentioned in the statute of 22 & 23 Car. 2. All these being in the purview of the act must be specifically negatived by the prosecutor in his information. The distinction between this case and one where

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where the exceptions are introduced by way of proviso in a statute, was expressly stated by Mr. Justice *Dennison*, than whom no person was ever better versed in the rules of special pleading. And in Sir *James Burrow's* report of the case (a), it is stated to have been said by him, "that the evidence of the adjudication ought both of them to be, that the defendant has not those qualifications that are specified in the act, or any of them." That that was so stated and understood by the bar at the time appears from the precedent of the form of such a conviction settled by Mr. *Dunning*, which is given by Mr. *Boscarwen* in his treatise on convictions (b), in which precedent the qualifications are all specifically negatived not only in the information, but also in setting forth the evidence, and again in the adjudication. But it is said to be impossible for the prosecutor's witness to give negative evidence of the want of qualification in the defendant: but I do not see why that may not be done. A witness may give general evidence of it from his belief. He may know the defendant, and know that to all appearance he is not a man of substance: evidence may be given of his condition in life to raise a reasonable presumption against his having any of the necessary qualifications. It is necessary for courts of justice to hold a strict hand over summary proceedings before magistrates, and I never will agree to relax any of the rules by which they have been bound. Their jurisdiction is of a limited nature, and they must shew that the party was brought within it. Shall it be sufficient for the witness to say, that he saw such a person (perhaps a nobleman of the highest rank and largest fortune in the kingdom) out a shooting on such a day;

(a) 1 Burr. 154.

(b) p. 156. vide p. 44-6. in the same book.

and shall that be sufficient to convict him, because the information, which is not upon oath, contains in point of form an allegation that the defendant was not qualified. If this were sufficient to warrant a conviction, unless the defendant proved his own qualification, it may be necessary for him to bring his title deeds and witnesses from the furthest part of the kingdom, in order to shew his qualification. The proposition is monstrous; and the inconvenience and vexation would be insufferable. I know not how far it may not extend. The legislature only intended to subject persons not having certain qualifications to this summary jurisdiction. The defendant must therefore be shewn to be such a person. And if Lord *Mansfield*, Mr. Justice *Dennison*, and Mr. Justice *Foster* thought that all this was necessary above forty years ago, surely the length of time which has since elapsed, without their decision having been called in question, has not weakened but rather confirmed the authority of it. Therefore I am of opinion in this case, that evidence ought to have been given of the defendant's want of the qualifications mentioned in the statute, which the magistrate should have set out in the conviction, and that he should have proceeded to adjudge that the defendant had not those qualifications.

GROSE J. I shall not attempt to vindicate all the doctrine which is to be found in the books respecting summary proceedings before justices of peace. There are certain technical rules laid down for their observance, which I cannot reconcile to the rules which regulate proceedings in other cases. I cannot say why there should be any distinction between the mode of proof in a proceeding of this sort, and in an action on the game laws, where I believe no negative proof is ever given by the prosecutor

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of the want of qualification in the defendant; but the affirmative proof lies upon him to shew such qualification. On looking however into the books, one finds that distinctions have been made between them, and that certain technical rules have been established for regulating proceedings on convictions which cannot now be overthrown without manifest confusion. Amongst other rules it has been said by Lord *Mansfield* and Mr. Justice *Dennison*, that there must be *evidence* of the defendant's want of qualification in order to warrant a conviction: and there is no such evidence stated in this conviction. Whatever therefore my opinion might have been if this had been *res nova*, I cannot set up my judgment against theirs which has been so long acquiesced in, and therefore I feel myself compelled to say that this conviction is bad.

LAWRENCE J. Every conviction must undoubtedly charge, that the defendant had none of those qualifications which are mentioned in the enacting clause of the statute; for unless that be so charged, there is no offence imputed to the defendant of which he can be convicted. Then the fact committed by the defendant which brings him within the offence charged must be proved and set forth, and the magistrate must proceed to convict him of the offence imputed to him. But if there be a complete charge of the offence in the information, I do not see that, if the adjudication convict the party of the offence as charged against him in the information, it is necessary to repeat that charge in the adjudicating part of the conviction: the repetition of it does not make it stronger or more clear. Then as to the mode of proof by which the charge is to be sustained, I see no reason why the proof of the fact committed by the defendant should not *prima facie* be sufficient,

sufficient, at least so as to throw the onus upon him of proving that he was qualified to do it. The difficulty of proving the negative of all the qualifications stated is so great as to make it impossible in some cases for a prosecutor to do it. It may perhaps sometimes be shewn that the defendant is in some inferior situation of life, such as a servant or the like, and so it may be presumed that he is not likely to be qualified: but the qualifications themselves are very numerous; and where the party is not known, or his circumstances not apparent, it must be almost impossible for a prosecutor to give even that sort of evidence, much less to disprove every qualification mentioned. A party may have small estates in several counties unknown to the prosecutor, all which together may amount to a qualification, though each were much below it. At any rate, there seems to be little or no advantage to a defendant in calling upon a witness to give general negative evidence of want of qualification, even in cases where it is capable of being done from a previous knowledge of the party. And if the main fact be proved that he killed the game, &c. and he does not then prove that he was qualified to do so, nor desires further time to bring forward such proof, it appears to me that the justice is authorised to conclude that he is not qualified, and to convict him of the offence charged in the information. Here the information charges an offence within the jurisdiction of the convicting magistrate; the witness proves the fact committed by the defendant, which subjects him to the penalty of the statute; and the adjudication referring to the offence charged in the information convicts him of such offence. But in *Rex v. Jarvis* the defect was in the information itself, which did not negative the qualifications. To that therefore must be principally referred

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what was said by the Court; which appears to have been grounded on the case of *The King v. Marriott*, where the witness swore to the want of qualification, without its being charged in the information. Indeed in *Rex v. Crowther* it seems as if it was required of the witness to give general negative evidence of the defendant's want of qualification, though it was holden not to be necessary to negative every particular qualification. But in that case it was not necessary to determine upon the necessity of it. And I cannot see what advantage it is to the defendant if it were given. Therefore upon the general rule which governs evidence of this sort, I think the affirmative proof lay on the defendant, and that the conviction is right.

LE BLANC J. The conviction states the information laid before the magistrate, which negatives every particular qualification in the defendant. Then it states, that the party had notice of the charge, and was present when the witness was examined; that he pleaded not guilty, and the witness proved the fact against him; and then being called upon to make his defence, he pretended that he was qualified, but produced no evidence of it; whereupon the justice adjudges him guilty of the offence aforesaid. The first objection made is, that there was no summons, but that has been properly given up; for when it is stated that the party was present and heard the charge and the evidence against him, and made no defence, nor required any further time to prepare his evidence, it seems to be fully sufficient to warrant a conviction. Secondly, it is objected, that the evidence does not negative the defendant's qualifications; and thirdly, that they are not negated by the adjudication. As to this last, when the information charges that he had none of the particular qualifications required

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required by the statute, which it specifically sets out, and the justice adjudges him guilty of the offence *aforsaid*; that must necessarily mean the offence as it appears to be charged in the information, and is the same as if the adjudication had repeated in the negative all the qualifications there stated. As to the second objection, that the evidence does not negative those qualifications. In general the rule is considered to be, that a party is not required to prove a negative, but it lies on the other side to prove the affirmative of that which he insists on. Where the party has notice by the information of the offence with which he is charged, and which states that he had not such and such qualifications, that gives him notice to come prepared with proof that he has any such qualification. So far he is benefited by the form of the information. But as to the proof, I do not know that there are different rules of evidence in case of proceedings before magistrates from those which apply to actions in the courts above. And if the Court were to determine that it was necessary for the witness to negative the defendant's qualifications, in order to warrant a conviction by a magistrate in this mode of proceeding, I do not see why it must not be equally necessary to give the same evidence before a judge and jury in an action for the penalty. Whatever is an authority for the one must I think equally bind the other. In *Rex v. Jarvis* the information itself did not negative the qualifications; that therefore was a fundamental objection. It was there neither charged, proved, nor adjudged that he had not any of the particular qualifications mentioned in the statute. The observation therefore made on that case by the Court applied to the information and to the whole of the proceedings, because in no part of the conviction were the particular qualifications nega-

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tived: it was not necessary therefore to discriminate between the information and the evidence. Therefore as the information in this case contains a proper and full charge of the offence, and it appears to me to be impossible that the prosecutor should be able to prove negatively that the defendant has not any of the qualifications mentioned, I think the conviction right.

The Court, being equally divided, made no order.

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A service under a hiring by the week (the servant boarding and lodging himself), nothing being said about Sunday, but the servant working on that day or occasionally when asked by his master, without additional wages, though he sometimes received victuals, may be joined with service under a yearly hiring as a menial servant; so as to confer a settlement by hiring and service for a year.

TWO justices by an order removed *Thomas Dunsford*, together with his wife and three children, by name, from the parish of *Alibon* to the parish of *Sutton*, both in the county of *Surry*. On appeal a case was reserved, stating, That the pauper, having gained a settlement in *Gham*, hired himself by the week to Mr. *Hutch of Sutton*. Nothing was said about "Sunday" in the contract; but the pauper worked on that day occasionally when asked by his master without receiving any additional wages; though he sometimes received some victuals. He received his wages every *Saturday* night or *Sunday* morning; and resided in his master's house during no part of the time, but boarded himself. That at the expiration of nine months, on his master's family servant going away, the pauper was hired in his place for a year, at 12*l.* per annum, and served eleven months under that hiring. The Sessions, being of opinion that the pauper gained a settlement in *Sutton* under such hiring and service, confirmed the order.

Nowlan and *Cowley*, in support of the order of Sessions, contended that this case came within the principle of *Rev*
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v. *Bagworth* (a), where it was determined that service under a hiring for a year would connect itself with preceding services under any number of hirings from week to week. The only question then is, Whether the pauper continued under the control of the master the whole time, *Sundays* included? If so, no doubt a settlement was gained, according to what was expressed by *Foster* J. in *R. v. Wrington* (b); and at least it was evidence sufficient to warrant the finding of the Sessions, as was said by Lord *Kenyon* in *R. v. St. Mary Lambeth* (c). A hiring by the week must *prima facie* be taken to include *Sunday*, if nothing be said to the contrary; and this presumption is much aided by the fact found, that the pauper did occasionally work on the *Sundays* for his master whenever he was asked, for which he received no additional wages; though sometimes he had victuals, which was evidently only by way of gratuity. Where the contract was general, though the servant claimed and exercised the privilege of having *Sundays* and even holidays to himself, it was held to be no exception in the contract, and he gained a settlement under it. *Rex v. St. Agnes* (d). The case of *R. v. Birmingham* (e) went on the same ground. No difference is here stated in the nature of the services under the respective hirings, only that the pauper during the time that he served by the week did not lodge in the master's house: but that is not material. In the last-mentioned case, the pauper sometimes lodged with his master, and sometimes not: and when he did, he paid for his board. Such also was the case in *R. v. Whitechapel* (f),

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(a) *Cald.* 179.(b) *Burr.* S. C. 282. (and vide *R. v. Macclesfield*, ib. 460.)(c) 8 *Term Rep.* 239.(d) *Burr.* S. C. 671.(e) *Doug.* 333. and *Cald.* 77.(f) 8 *Mod.* 369. *Foley*, 146. 2 *Const.* 457.

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and *St. Peter's in Oxford v. Chipping Wycombe* (a). In *R. v. Seaton and Beer* (b), service under a hiring at weekly wages the same as the other man, (who had filled the same employ,) and the walls of the stables, was joined to a service under a yearly hiring, so as to confer a settlement. So an alteration in the wages or the service in the middle of the year will not prevent the gaining a settlement under a yearly hiring. *R. v. Alton* (c); and *R. v. Grendon Underwood* (d). In *R. v. Great Chilton* (e) it was not denied that the services, though differing in the same degree as in the present case, might be joined; but a majority of the Court held, that the first contract being dissolved, and the pauper being married when he made the second contract, therefore the services could not be joined. The only case which seems to bear the other way is *R. v. Wrington* (f); but there the pauper, though stated generally to be hired by the week, always received her wages on the Saturday, and her master then told her to come to work again on the week following. She was afterwards hired for a year; but the Court would not connect the services, because the pauper under the former hiring was not under the control of her master at nights or on Sundays. But here the contrary is found by the facts stated, and the conclusion drawn by the Sessions. Something also turned there on the nature of the service, which was in a manufactory: but this was a general servant in husbandry. Besides, when that case was decided, the distinction between exceptions in the contract and dispensations of service were not so well settled as at present: and at any rate that de-

(a) 1 *Sira.* 528.(c) *E. 24 Geo. 3. Ib.* 382.(e) 5 *Term Rep.* 672.(b) *E. 24 Geo. 3. 2 Comst.* 352.(d) *Cald.* 359.(f) *Burr. S. C.* 280.

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termination was prior to the case of *R. v. Bagworth*, where the conclusion was different.

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Marryat and *Lawes* contra. The services to be joined must be ejusdem generis, and the servant must continue the whole year under the control of the master. Now here, 1st, the services were of a different nature; the one as a weekly labourer boarding and lodging out of the master's family; the other as a menial servant under a yearly hiring. But, 2dly, From the very nature of the first contract the *Sundays* must have been excluded. The contract of a weekly labourer out of doors is always understood to be for the working days only of the week. The very circumstance of his master's asking him occasionally to work on the *Sundays* shews that by the general contract he was not bound to do so; and accordingly he generally received some gratuity for it. The case of *R. v. Wrington* (a) is in point; and that is not contradicted by *R. v. Bagworth*; for there the pauper was a menial servant in the house all the time, which was mainly relied on by the Court in giving their judgment: but here it is otherwise.

LORD KENYON C. J. It has now been too long settled to be recalled, that if there be a hiring for a year and a service for a year, though but a small part of the service were performed under the yearly hiring, a settlement will be gained. But an attempt has been made to introduce a new head of settlement law, of which I have no knowledge, under a notion that only services ejusdem generis, as it has been said, can be joined. That term got into fashion some time ago. At that period Mr. Justice *Foster* thought that settlements were too easily acquired by the construc-

(a) *Burr. S. C.* 235.

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tion which the Court was inclined to put on the statute: but since then the leaning has been in favour of them; and it has been supposed that a person ought to gain a settlement in that parish where he has laboured for a certain time, as a reward for his labour: a strange idea, if examined; because somewhere or other he must at any rate be maintained if he be in want of it. I know not how to state this as a question upon which any doubt can be made. The pauper was hired by the week: nothing was said about *Sunday*; it is very seldom that there is: Why then is that day to be excluded? If a servant be hired for a year, nobody doubts but that *Sundays* are included. Then why not included in a weekly hiring, if no exception be made? The Sessions have found that there was a hiring by the week, which must mean the whole week. There is nothing stated to shew it was otherwise intended. The pauper was paid sometimes on the *Saturday*, sometimes on the *Sunday*; and whenever the master ordered him to do any work on the *Sunday*, he did it. What is to be concluded from thence, but that it was his duty to do so. How do these facts shew that he was not under the master's control on the *Sundays* as well as other days of the week? In *R. v. Wrington*, it appeared from the circumstances that *Sundays* were excluded. But it is said, that the services cannot be joined, because they were not *ejusdem generis*. I really know not what that means, nor where the line is to be drawn. Suppose a postillion were made coachman; would those be deemed services *ejusdem generis*? It is said, that he was first an outdoor servant and then a *family* servant: but I do not know what difference that made in his services. Upon the whole, I cannot do better than adopt what the justices below have done: they have determined that there was a continuing service

service for a year, and a hiring for a year, and that he gained a settlement; and I think they are warranted by the authorities in that conclusion.

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GROSE J. First it is objected, that the servant was not under the control of his master the whole year. Secondly, that the services were not ejusdem generis, and therefore cannot be joined. As to the first, it is said that *Sundays* were not included in the weekly hiring. But why not? The hiring was by the week, and nothing was said about *Sunday*; and he did whatever his master bid him do on that day. What are we to collect from thence, but that the parties considered that *Sunday* was included; and the justices have by their order found that it was. Then 2dly, as to the services not being ejusdem generis; under both contracts the pauper was a servant in husbandry, only boarding in the one case out of the master's house, and in the other boarding in it. Then what is this, but the same sort of service throughout.

LAWRENCE J. assented.

LE BLANC J. I cannot see upon the facts stated, that the service under the one hiring was of a different nature from that under the other.

Order confirmed.

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1797 the ship, being about to proceed from *Charlestown* on a voyage to the *Havannah*, obtained at *Charlestown* three passports or sea-letters in the *English*, *French*, and *Dutch* languages, the same as are constantly made use of by all *American* ships, and respectively signed by the President of the United States in the following form (a): “ *George Washington* President, &c. To all, &c. Be it known, that permission has been granted to *A. R.* commander of the ship *South Carolina* of *Charlestown* of the burthen of 250 tons, being at present in the port of *Charlestown*, and bound for *Havannah*, loaded with salt, &c. that after this ship has been visited and before his departure, he shall make oath before the officers authorised for this purpose, that the said ship belongs to one or more citizens of the U. S. of *A.*; the act whereof shall be placed at the foot of these presents; and in like manner that he will keep and cause to be kept by his crew the maritime ordinances and regulations; and enter a list signed and confirmed by witnesses, containing the names and surnames, the places of birth and residence, of the persons composing the crew of his ship, and of all those who shall embark therein, &c.; and in every port or harbour which he shall enter with his ship, he shall shew the present permission to the officers authorised thereto, and make a faithful report of what has passed during his voyage; and he shall carry the colours, arms, and ensigns of the U. S. during his said voyage. In testimony whereof,” &c. Sealed with the seal of the U. S., and countersigned by the collector of the customs of *Charlestown*, and dated 30th of *January* 1797.

(a) Only the French translation is here given, as that on which the argument principally turned at the bar.

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The ship afterwards sailed from *Charlestown* to the *Havannah* with the aforesaid passports, and returned thence to *Charlestown* in the beginning of *May* in the year 1797, when the captain deposited the passports together with the other ship's papers at the custom-house there; and on the 27th of the same *May*, being about to sail again in the said ship upon a voyage from *Charlestown* to the *Havannah*, and from thence to *London*, he received back from the deputy collector of the customs the said passports, with an indorsement made by the said deputy collector thereon, as follows: "District and port of *Charlestown*, *May* 27th, 1797. These are to certify to all whom they may concern, that *Andrew Robertson*, master of the ship *South Carolina*, has this day cleared for the *Havannah*, laden with sundry articles of merchandize, consisting of oil, dry goods, and tallow. Given under my hand and seal of office at *Charlestown* the day and year above written. (Signed) W. W. Dep. Collector." The captain at the same time took and made entry of all such other documents and papers as are usually taken or made entry of by captains of *American* ships. On the 1st of *June* 1797 the ship sailed upon the said voyage from *Charlestown* to the *Havannah* and *London*, and arrived in the river *Thames* in *September* 1797; and after her arrival there took on board the goods insured. And the captain having been obliged by the death of several of the crew to take others on board, all of whom were *American* subjects, procured a new muster-roll upon oath made before the Lord Mayor of *London*, and signed and certified by the *American* minister, having left the original muster-roll with the said minister. Afterwards, on the 11th *December* 1797, the ship sailed on the voyage insured from *London* to *Charlestown*; and on the 28th of the same month was captured by a *French* privateer and carried into *L'Orient*,

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Sentence.

Questions of fact.

Questions of
right.

Considering in
law.

L'Orient. The ship at the time of her sailing upon the voyage insured, and from thence until and at the time of her said capture, had on board, together with all other usual papers and documents, the abovementioned passports so indorsed as aforesaid, and also the said muster-roll so signed as aforesaid; which were exhibited to the captain of the said privateer. Proceedings were instituted against the ship before the tribunal of commerce at *L'Orient*, by which the following sentence of condemnation (a) was pronounced, dated the 14th *Pluviose*, 6th year of the French republic. The ship *South Carolina*, commanded by A. R., was she attacked, &c. as a prize under *English* colours? Was captain R. at his departure from *Charlestown* provided with a list of the crew in the form required by the French laws and regulations? At the time of the capture was the list of the crew taken away which the captain declared that he had taken at *London*, to replace his first list? Had that list, supposing it to exist, the legal form to supply the first list? Do the bills of lading and other papers touching the cargo prove the neutral property of it? Considering in fact, that there is no proof that the privateer *Le Patriot* stopped the *South Carolina* under *English* colours. That Captain R. does not prove that he was provided with a list of the crew attested by the public officers of *Charlestown*: that it appears that the captain did really get a fresh list of the crew from the ambassador of the United States at *London*, and that he has not proved that this document was delivered to the captors, and that there is no proof of the pretended concealment of it; considering in law, that the register and sea-letter prove the *American* property of the ship; but that the log-book

(a) The sentence was set out at length in the special verdict, but the substance only is here stated.

proves

proves that the said passport dated the 30th January 1797, has served for several voyages *contrary to the formal regulations of the 4th article of the ordinance of the 28th July 1778*, thus expressed; "A passport can serve but for one voyage only," &c. That admitting the existence of the list of the crew obtained in *London*, it would be insufficient to answer the intentions of the *said ordinance*, which sets forth, article 9th, "all foreign vessels shall be good prize, on board whereof there is a merchant, super-cargo, &c. of a country, enemy of his majesty, or whereof the crew shall be composed of more than one-third of sailors, subjects of states enemies of his majesty, or which shall not have on board the list of the crew attested by the public officers of the neutral places from whence the vessels took their departure." Considering that neither the bills of lading establish the neutrality of the goods, and that the declarations of the shippers made before the mayor of *London*, made for that purpose, and by him certified on the back of them, cannot answer the regulations of the 2d article of the ordinance, which expresses, &c. (setting forth another *French ordinance*.) Considering that the decree of the Executive Directory of the 12th *Ventose*, 5th year, promulgates to the *Americans the ordinances of 1774 and 1778*, relating to the navigation of neutral vessels, &c. Therefore the ship *South Carolina* and her cargo was declared good prize. From this sentence Captain *R.* appealed, and the court of appeal on the 4th *Floreal*, 6th year, &c. pronounced the following sentence (a). Questions. Is the capture of the ship, &c. valid? Is the sentence of the tribunal of *L'Orient*, &c. agreeable to law and the ordinances of France? Is the demand of Captain *R.* to be

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Appeal.

Questions.

(a) The substance only is preserved.

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allowed to prove the list of the crew, declared to have been made at *London*, and with-held from him, admissible? Reasons. Seeing that the former sentence is supported by the maritime laws and ordinances established in matters of prize; that the 4th article of the ordinance of the 26th of July 1778 expresses, "that a passport can serve but for one voyage;" and that it is evident by the log-book, that the ship *South Carolina* has made several voyages with the passport which was granted her on the 30th January 1797: that the 18 bills of lading do not exhibit any mark of neutrality of the goods, and that the certificate affixed thereto does not satisfy the second article of the same ordinance, which expresses, &c. (as before): that these bills of lading do not declare the neutrality of the goods: that the tribunal of *L'Orient* has pronounced on the supposition of the existence of the pretended list of the crew taken at *London* by Captain R., which does not prevent applying to him the articles of 9th, 12th, and 9th of the ordinances of 1704, 1744, and 1778, and which renders useless his demand of proof respecting this list. Considering if all these provisions are not sufficient of themselves to establish the former sentence, the law of the 22d Nivose last declaring, that the neutrality of ships shall be determined by their cargo, the ship *S. C.* is within the scope of this law, as her cargo is entirely of goods of *English* manufacture, &c. Considering the fourth article of the ordinance of the 26th of July 1778, expressing, "A passport can serve but for one voyage only." The 9th, 12th, and 9th articles of the ordinances of 1704, 1744, and 1778, which enacts, &c. (as before.) Considering the law of the 29th Nivose last, expressing, article 1st, "the state of ships in regard to what concerns their neutral or enemy's quality shall be determined by their cargo; therefore every

voted

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vessel met at sea laden entirely or in part with goods the produce of *England*, shall be declared lawful prize, whoever may be the owner. The tribunal declares the former sentence valid, &c. The special verdict then set out the several *French* ordinances above referred to. It then stated, that a treaty was concluded on the 6th of *February* 1778 between *France* and the United States, containing (inter al.) the following articles and form of passport. Article 12. The merchants' ships of either of the parties which shall be making into a port belonging to the enemy of the other ally, and concerning whose voyage and cargo there shall be just grounds of suspicion, shall be obliged to exhibit as well on the high seas, &c. not only their passports, but likewise certificates, expressly shewing that their goods are not prohibited as contraband. Article 25. To the end, that all dissensions may be avoided, it is agreed, that in case either of the parties should be at war, the ships belonging to the subjects of the other ally must be furnished with sea letters or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship, that it may appear thereby that the ship really and truly belongs to the subjects of one of the parties; which passport shall be made out according to the form annexed to this treaty. They shall likewise be recalled every year, that is, if the ship happens to return home within the space of a year. It is likewise agreed, that every such ship being laden is to be provided not only with passports as above mentioned, but also with certificates, containing the particulars of the cargo, the place whence she sailed, and whither bound, that it may be known whether any contraband goods be on board; which certificate shall be made out by the officers of the place whence the ship set sail in the

accustomed

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accustomed form; and if any one shall think it fit to express in the said certificate the person to whom the cargo belongs, he may do so. Article 27th. If the ships of the said subjects of either of the parties shall be met with on the high seas, &c. by any ship of war or privateer of the other, the said ship of war, &c. for avoiding any disorder, shall remain out of cannon shot, and may send their boats on board the merchant ship, and board her to the number of two or three men only, to whom the master of such ship shall exhibit his passport concerning the property of the ship made out according to the form inserted in this present treaty; after which the ship shall be at liberty to pursue her voyage without molestation or search, &c. It then stated the form of the passport; which was the same as that used, only leaving blanks for the names of the captain and ship, and the places to which she belonged, and where she then lay, and the amount of her tonnage, and where bound, and with what laden, and for the date. It then set forth the decree of the 12th *Ventose*, 6th year, &c. referred to in the above sentences; which decree refers to the treaty, article 4th; "Agreeable to the law of the 14th of *February* 1793, the directions and regulations of the 21st *October* 1744, and 26th *July* 1778, concerning the manner of proving the property of neutral ships and goods, shall be executed according to their form and tenor; consequently every *American* ship shall be good prize which shall not have on board a muster-roll of the crew in due form, such as is prescribed by the model annexed to the treaty of the 6th *February* 1778, the execution whereof is ordered by the 25th and 27th articles of the said treaty." The special verdict then set forth a law of the United States, dated 1st of *June* 1796, whereby the form of the passport was prescribed, and a penalty of 200

dollars imposed on every captain of an *American* vessel bound to any foreign country without such passport. It then stated notice to the defendant of the premises, and a demand and refusal to pay the loss.

1801.

 Price
against
Bell

This case was first argued in *Easter* term 40 *Geo.* 3. by *Giles* for the plaintiff, and *Carr* for the defendant; and again in *Trinity* term following by *Adam* for the plaintiff, and *Perceval* (now Solicitor General) for the defendant; and a third time in *Michaelmas* term last by *Gibbs* for the plaintiff, and *Erskine* for the defendant. Much of the argument turned upon the construction of the sentences of condemnation, the *French* ordinances, and the treaty between *America* and *France*, which is either altogether omitted or very briefly adverted to. The matter first came on in the shape of a case reserved from the Sittings; but after the second argument it was turned into a special verdict by the desire of the Court, who thought the question raised upon the implied warrant of great magnitude.

On the part of the plaintiff it was contended, 1st, that the sentences of condemnation proceeded altogether upon the breach of *French* ordinances, which carried the regulations concerning ship documents further than the treaty between *France* and *America*, by which alone the question must be governed. As to the muster-roll required by the *French* ordinances, it was decided in *Pollard v. Bell* (a), and *Bird v. Appleton* (b), not to be binding upon a foreign independent nation, nor necessary in order to legalize the insurance. As to the passport, the *French* ordinance of the 12th *Ventose* does indeed require that it shall be renewed every voyage; but the treaty (art. 25.) only stipulates for a renewal once a year, or as soon after as the

(a) 8 Term Rep. 434.

(b) Ib. 562.

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ship returns to port. The object of the passport was not to license the ship for a particular voyage, but to serve as an annual recognition of her country. Now here the passport was within time, being dated in *January 1797*, and the voyage to *London*, which was the second in that year, having commenced in *June 1797* from *Charlestown*, and the voyage insured from *London* having commenced in *December* in the same month, on the 28th of which *December* the ship was captured. 2dly, It was not necessary for the passport to describe the whole of the intended voyage, but only the first place of the ship's destination to which she cleared out; for the ship might afterwards vary her voyage. The treaty indeed does not require even this latter description, though a blank is left for it in the form of the passport, which was merely for the purpose of identifying the ship the better at the time. The law of the United States, which inflicts a penalty on the captains of such vessels as sail without first obtaining a proper passport, is at any rate only a revenue law, a breach of which would not avoid the insurance, although it might subject the party to the penalty. Besides, all this happened before the voyage insured; and admitting that she had not a proper passport as required by the *American* law, yet if it were sufficient within the scope of the treaty between *America* and *France*, an underwriter on the subsequent homeward-bound voyage could not take advantage of it. In *Christie v. Secretan* (a) one of the judges said, that he could not subscribe to the extent of the doctrine contended for at the bar, that a ship insured here must be navigated according to the laws of the country from which and to which she sails; unless it appeared that the contract of insurance tended, if enforced, to contravene any of the laws of our

(a) 8 Term Rep. 192.—7.

own country. [Lawrence J. That must be taken with this distinction, that there is no express warranty. A warranty makes a condition precedent. But where there is none, it does not follow that because a foreign assured may for his own protection procure ship-papers required by the laws of his own country, therefore the under-writers here can avail themselves of his not having them, where the loss is not attributable to that cause.] Here it is found, that the ship had the usual documents of an *American* ship; and it lies on the underwriter to shew in what respect she was not properly documented, and that the loss happened in consequence of it. But still, however doubtful the case might have been whether, if the ship had been expressly warranted *American*, it might not have been necessary for her to have had all proper *American* documents, yet there being no such warranty here makes all the difference. The very circumstance of requiring a warranty in some cases and not in others shews the understanding of the parties that the underwriter takes upon himself a greater risk in the one case than the other; and common experience shews that the value of such a risk is capable of being calculated; for the premium is greater in the one case than the other. The effect then of requiring that every ship insured, though not warranted, shall be properly documented, as the laws of that country to which she belongs require, will be to raise a warranty against the manifest intention of the parties, and after the underwriter has received a greater premium on account of the increased risk, because the assured would not make such a warranty. If the law raise such an implied warranty, it is extraordinary that the question should never have occurred before the case of *Christie v. Secretan*; upon which point however the judgment there did not proceed. And in *Rich*

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v. *Parker* (a) the question could not arise; for that was a case of express warranty. The implied warranty of seaworthiness does not apply here; for the want of that is generally a latent defect, often unknown even to the owner, which renders it almost impossible for the voyage to be performed; and therefore the underwriter cannot calculate what he ought to take for an indemnity: but there is nothing latent in the country to which a ship belongs, and therefore the risk may be calculated like that of capture. And if it be material or required to be known, the underwriter may stipulate for the usual warranty, or an enhanced premium. Seaworthiness is an excepted case; that is in the nature of a condition precedent, as every warranty whether express or implied must be; and such exceptions ought not to be extended further than the necessity of the thing requires; because they avoid the contract ab initio, though the loss did not happen on that account. The reason why seaworthiness is an implied warranty is because the true cause of the loss can rarely be known in such cases, and there is a violent presumption that it happened from the latent defect; but being a condition precedent, though the loss be proved to have happened from some other uncontrollable cause, still the assured cannot recover. But it does not follow that every matter, which if the loss happened in consequence of it would be a defence to the underwriter, is therefore an implied warranty and condition precedent; for where a ship has been guilty of smuggling on a former voyage, in consequence of which she is afterwards seized in the voyage insured and confiscated, though the insured could not recover against the underwriter for such a loss, that is not on the

(a) 7 Term Rep. 705.

ground of implied warranty, but because the loss did not happen from any peril insured against: and undoubtedly if the loss happened from capture of an enemy, it would be no defence to an underwriter that the ship was liable to seizure and confiscation in consequence of a preceding smuggling voyage. Suppose the master and crew were guilty of gross negligence or impropriety, as by getting drunk, or all going to sleep at the same time, in consequence of which the ship was lost; this not amounting to barratry, the underwriter would not be liable: but still there is no implied warranty by the owner that the master and crew shall not do such acts; and therefore though the act were done, yet if no detriment happened from it, but the ship were afterwards lost from some peril within the policy, the underwriter would be liable. There being no warranty here of the ship's country, even if she had turned out to be a belligerent, and consequently liable to the additional risk of capture by an enemy, the defendant would still have been liable; and yet that is a greater risk than can reasonably be expected from a neutral's want of formal documents.

For the defendant it was insisted, 1st, That the condemnation was not merely grounded on the *French* ordinances, but on the treaty between *France* and *America*, which adopts the maritime ordinances of *France*; and the sentence, which was by a Court of competent jurisdiction, has put a construction on the treaty requiring the muster-roll to be on board the ship, and that she should have a proper passport renewed every voyage, which was not the case here. Then however erroneous that construction may be, this Court cannot sit as a court of error to revise their

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judgment. *Garrels v. Kensington* (a) went on that ground. The 25th article of the treaty requires, that before an *American* master shall take out a passport, he shall swear to keep the maritime ordinances and regulations; which must mean those of *France*; for *America* having then recently established her independence, had no maritime code of her own. Besides, *America* would not bind herself by treaty to keep her own ordinances, which without any treaty her subjects were bound to do. At any rate, if the treaty be doubtful, the ordinances may be taken to explain it. 2dly, If the treaty be taken to refer to the maritime ordinances of *America* only, still the passport is void, not being conformable to the *American* law; inasmuch as the destination of the ship was not truly stated; which is most material to be known, as was said by Sir *W. Scott* in the case of the *Juffrouw Anna* (b), because questions of prize or no prize frequently depend on that circumstance. When the ship sailed the second time from *Charlestown* her true destination was to the *Havannah* and *London*, the latter being the ultimate object of the voyage; but the passport only mentions the former. This was calculated to mislead the cruisers of *France*, and was a fraud upon her: and if the want of any passport would have been a good cause for condemnation, a fortiori a false one is so. Then this is not aided by the finding of the special verdict, that the vessel had the usual papers on board; for that does not conclude the question whether such papers were legal by the terms of the treaty and the ordinances of *America*. Then 3dly, though the vessel insured were not warranted *American* in express terms, yet there is an implied warranty in every contract of insurance, that the

(a) 8 Term Rep. 230.

(b) 1 Rob. Adm. Rep. 126.

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ship shall be navigated according to the laws of her own country, the law of nations, and such particular treaties as bind her own country to foreign states. It seemed to be so considered by the Court in *Christie v. Secretan* (a). And the opinion there intimated was the stronger, because that was an action by an insurer on goods only, who has no control over the ship; whereas this is by the owner of the ship as well as of the cargo. This is grounded upon the same general principle which governs the case of seaworthiness, that the assurer shall properly perform or provide for the performance of every act over which he has a control, so as not to enhance the risk of the underwriter by any laches of his own, or those whom he employs. The present is even a stronger case for the raising of such an implied warranty; for the want of seaworthiness is sometimes unknown to the assurer, but he can always ascertain whether the ship be properly documented. Whatever is of the essence of a contract implies a warranty, whether so called or not; and this is not confined to seaworthiness, but comprehends also a master and crew of adequate skill and strength adapted to the ship and the nature of the voyage; and necessary tackle and provisions are also included. In these cases the event signifies nothing: for in case of a loss at sea, how can it be told whether it happened by the common perils of the sea, or from the insufficiency of the ship or crew, or because they were starved for want of provisions. The case of all the crew going to sleep or getting drunk is beyond any implied warranty; because all that can be expected from the assurer is to warrant their capacity to navigate properly, and not their will or their acts. It is said, that if there be no warranty of country, the risk of the underwriter is

(a) 8 Term Rep. 192.

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not varied by the want of proper documents of the ship ; because he insures against all risks, even of an enemy, which are greater than those of a neutral ; but that is not so : for if the ship insured turn out to be a belligerent, the underwriter has the chance in his favour of her having provided force to repel force : she has also the protection of her own country ships of war, in the first instance, and for recapture : at any rate she will take more pains to avoid the enemy's cruisers. Whereas an honest neutral has nothing of this sort to fear ; she sails in the face of danger without any of the precautions of an enemy ; therefore her risk is so much the greater than that of a belligerent if she do not put herself in a condition to avail herself of her neutrality when stopped and questioned. The necessary documents to prove that are just as important to her safety as seaworthiness, and sufficient tackle, crew, and provisions. A warranty does not particularise the having such and such documents, but the necessity of having them is a consequence of law attaching on the warranty ; and therefore whether express or implied can make no difference. There is however a difference in one particular, where an express warranty goes further than an implied one ; for the former specifies the particular nation to which the ship belongs, and it would not be sufficient to shew that she was of any other neutral nation, though more favoured by the enemy. 4thly, If the ship were not properly documented, the assured cannot recover, although the loss happened not on that account, but from the non-observance of *French* ordinances which the *American* was not bound to observe : because it was a neglect of the assured whereby the underwriter's hazard was increased. This principle was clearly established in *Rich v. Parker (a)*. It

(a) 7 Term Rep. 705.

is true, that was the case of a ship warranted *American*; but that makes no difference, if this be an implied warranty. And that case was the stronger, because the vessel had the passport, the required document, on board at the time of the capture, though she sailed without it in the first instance. But in *Law v. Hollingworth* (a) the Court held, that there was an implied warranty on the part of the assured that the ship should be navigated up the *Thames* by a competent pilot; and there having been no pilot, the underwriter was discharged; though it did not appear that the loss happened from any want of competent skill in those who supplied his place. So *Farmer v. Legg* (b) went on the same ground.

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For the plaintiff, in reply to these lastmentioned cases, it was observed, that they went on the ground of disobedience of regulations enjoined by our own laws.

There appeared from the suggestions thrown out in the course of the argument to be a difference of opinion on the bench respecting the question of implied warranty; and the Court took time to consider of their judgment till this term, when

Lord KENYON C. J. delivered their opinion in the following manner. This was an action on a policy of insurance on the ship *South Carolina*, and on goods on board the same, from *London* to *Charlestown*. There was a loss by capture. The defendant pleaded the general issue, and paid the money into court on the money counts. The special verdict states, that the ship was in fact an *American*

(a) 7 Term Rep. 160.

(b) Id. 186.

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ship, but there was not any warranty in the policy. That on the 30th of *January* 1797, being then about to sail from *Charlestown* for the *Havannah*, the captain obtained the regular passports, which are set out verbatim in the verdict. In the beginning of *May* 1797 she returned from the *Havannah* to *Charlestown*, and deposited her passports with her other sea-papers in the custom-house at *Charlestown*. On the 27th of *May* 1797, being then about to sail again from *Charlestown* to the *Havannah*, and from thence to *London*, the captain received back from the custom-house at *Charlestown* his passports, with a certificate indorsed thereon, stating that he had that day cleared for the *Havannah* with goods specified in that indorsement; and at the same time took all other documents and papers usually taken or made entry of by *American* ships. The ship sailed from *Charlestown* to the *Havannah*, and from thence to *London*, and arrived in the river *Thames* in *September* 1797. At *London* she took in her cargo (the goods insured) for *Charlestown*; and on the 11th of *December* 1797 sailed on the voyage insured, viz. from *London* to *Charlestown*, and was captured by the *French* on the 28th of *December* 1797. At the time of her capture she had on board, together with all other usual papers and documents, the passports so indorsed. She was condemned with her cargo by the tribunal of commerce at *L'Orient*; and that sentence affirmed on appeal by the tribunal of the department of *Merbihan*. Both sentences are set forth in the special verdict.

The demand made by the plaintiffs, the assured, upon this policy is resisted by the underwriter on these grounds; that although the policy does not contain any warranty of what nation or description the vessel is, yet she being in fact an *American*, the law implies a warranty on the part
 of

of the assured, that she shall be furnished with all such papers as an *American* ship ought to have : that this ship the *South Carolina* had not such a passport and certificate as she ought to have had : and that it appears by the sentence of condemnation that she was condemned for want of such papers ; which by the treaty between *France* and *America* she ought to have been furnished with. On this statement three questions arise ; 1st, Whether in this case there be any *implied* warranty that the ship shall be furnished with all papers and documents, which an *American* ought to have ? 2d, Whether in fact this ship had all such papers ? 3d, Whether the condemnation proceeded on the ground that she had not such papers, as by treaty or the law of her own country she ought to have : or whether it proceeded on a want of such papers as the ordinances of France only require ? The opinion which we have formed on the two last of these questions renders it unnecessary at present to enter into any discussion of the first question, namely, whether there be any implied warranty in this case : on that question we desire to be understood as not giving any opinion. The sentences of condemnation appear to us manifestly to have proceeded on the ground of a breach of *French* ordinances ; particularly, the ordinance of the 26th of *July* 1778, which declares that a passport shall serve but for one voyage ; whereas by the treaty between *America* and *France* passports are to be recalled only every year ; and that only in case the ship returns into her port within the year. And in this case the passport which the *South Carolina* had on board at the time of her capture had been granted within the year ; for it is stated to have been granted on 30th of *January* 1797, and the ship was captured in *December* 1797. We therefore think that the condemnation was purely for a breach of.

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of *French* ordinances, which were contrary to the treaty, were not adopted by it, nor the condemnation expressed by the sentence to have been for acting contrary to the treaty. So that if there were any such implied warranty as has been contended for, the sentence of condemnation does not negative it. We also think that it appears upon this verdict, that this ship had all the papers necessary for an *American* vessel; and this puts an end to the defence made by the underwriter. The two papers in which the defendant contends she was deficient are the passport, and certificate. These papers are different in their nature: the first is an authoritative declaration by the government of the country to which she belongs, that the ship is the property of subjects of that country; and such passport this ship had at the time of her capture in *December* 1797; the same having been granted in *January* 1797 within the year. The other paper, the certificate, relates to the cargo, and answers to our manifest. The words of the 25th article of the treaty are, that besides the passport, "the ship shall also be provided with certificates containing particulars of the cargo:" this from its nature must be taken out at every port where she takes in cargo. Here the ship took in her cargo for the voyage insured at *London*; and the verdict states that she had all the usual papers and documents; and it does not any where appear that any paper, certificate, or manifest of her cargo taken in at *London*, which was the cargo insured, was wanting. On these grounds we are of opinion that judgment must be for the plaintiffs.

1801.

The KING *against* The Justices of WILT-
SHIRE.

Tuesday,
June 23d.

THIS came on upon a rule to shew cause why a mandamus should not issue to the defendants, commanding them at the next general quarter sessions to receive, proceed upon, hear, and determine the appeal of the churchwardens and overseers of the poor of the parish of *North Bradley* in the county of *Wilts*, against an order of two justices for the removal of *Jacob Smith*, his wife, and their two children from the parish of *Westbury* to *North Bradley*. The rule was obtained on affidavits stating, that by two several orders of removal dated the 31st of *December* 1800, *John Smith* a pauper and *Mary* his wife, by one of the orders, and *Jacob* their son, his wife, and two children by the other order, were removed from *Westbury* to *North Bradley*. That two several notices of appeal against both orders were given by *North Bradley* to *Westbury* parish, for the then next quarter sessions to be holden on the 13th of *January* 1801; and that *J. Francis*, one of the overseers of *North Bradley*, instructed his attorney to consent on the part of *N. B.*, that as both parishes were well assured that the settlement of *Jacob Smith* the son and his family was derived from the father, the appeal to the son's order should not be tried, and that the determination of the sessions as to the settlement of *John Smith* the father should govern the settlement of the son *Jacob*, in order to save expence. That accordingly admissions in writing were entered into by both parishes to that effect; and that the attorney for *Westbury* desired that the appeal against the order for the removal of the son might not be entered, to

Where the father and son were removed from *A.* to *B.* by two several orders of removal, and the parish officers of *A.* and *B.* agreed that the settlement of the son should follow that of the father, without the expence of a separate appeal; in consequence of which an appeal was only entered against the order removing the father; and after the Sessions had determined that the father was settled in *A.* and had quashed that order, *A.* refused to take back the son; this Court granted a mandamus to the Sessions to receive and determine the appeal against the order removing the son, though at a subsequent Sessions to that holden next after the order of removal made; the appeal being directed to be entered nunc pro tunc with proper continuances.


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save expence. That *N. B.* parish, relying on the faith of such admission, only caused an appeal against the order for removing the father *John Smith* to be entered; and such appeal was accordingly tried, and the order of removal quashed; whereby the father remained settled at *Westbury*. That soon after those sessions were ended the parish officers of *Westbury*, in breach of their agreement, sent the said *Jacob Smith* and his family to *N. B.*, who were under the necessity of receiving them back; but gave a fresh notice of appeal to *Westbury*, and also served the parish officers with a notice to appear at the next sessions to shew cause why the admission before entered into by their attorney should not be confirmed. That *N. B.* accordingly appeared at the next sessions on 14th of *April* at *Sarum*, and moved to enter and try the appeal; when the court of quarter sessions refused to interfere, alleging that it was not their practice to receive any appeal if not entered at the sessions immediately following the order of removal, and that they could not notice any private agreement between the parties. The serving the two notices of appeal was also proved by the attorney for *N. B.*; who also deposed, that afterwards the attorney for *Westbury* applied to him to endeavour to discover the settlement of the paupers without the expence of appealing, but they not agreeing as to the settlement of the father, but it clearly appearing that the settlement of the son was derived from the father, they agreed to admit that to save expence. The affidavit then set out certain letters which had passed between the parties, which contained a clear agreement to make the admission above specified, in order to save the expence of the second appeal, though there were other matters in controversy respecting the father's settlement.

On the other hand, the affidavits against the rule admitted the notices of appeal against both orders, and the subsequent agreement to let the son's settlement depend on that of the father, in order to save the expence of both appeals; but stated that at the conference between the two attornies *N. B.* acknowledged that *Smith* the father was once settled with them by service under indenture of apprenticeship; and the only question was, Whether he had afterwards gained a subsequent settlement by purchase in *W.*? But that upon the trial of the appeal *N. B.* refused to admit the indenture of apprenticeship, and consequently the merits of the appeal were not entered into. On which account *W.* parish refused to admit the son's settlement.

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Gibbs, on shewing cause against the rule, insisted on the particular terms of the agreement to be collected from the correspondence between the parties, from whence it appeared that *North Bradley* parish did not dispute that the father was once settled there; on which account *Westbury* parish had not come prepared with formal proof of the indentures of apprenticeship under which the settlement had been gained; and that requiring such proof at the Sessions was a departure from the agreement between the two parishes; the real subject of their dispute being only as to the subsequent settlement in *Westbury*, and which alone *Westbury* came prepared to disprove. That *North Bradley* having taken this undue advantage at the Sessions, *Westbury* parish ought not to be bound by the event of an appeal which was not decided on the real merits of the question. And he concluded by offering to let the appellants in to try the merits of the order for re-

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moving the son, if they would consent to let the father's settlement be governed by it.

Jekyll, in support of the rule, denied that the agreement extended in any respect to the father's settlement, but only to the son's, which was derived from it. That there was therefore no undue advantage taken by the officers of *North Bradley* in insisting upon the proof of the original settlement in their parish. But as they were prevented from entering their appeal in time to try the merits of the order removing the son from *Westbury*, by the agreement entered into with the latter, which made it unnecessary, *W.* parish ought not to be suffered to take advantage of their own wrong; but the Court under the circumstances would now direct the Sessions to enter the appeal *nunc pro tunc*, to prevent a failure of justice. And he referred to the following note of a case furnished by one of the officers of the Crown Office.

The Sessions are bound to receive an appeal presented at any time during the next sessions after the order of removal made.

" [Easter term, 23 Geo. 3. Mr. *Wilson* moved for a rule to shew cause why a writ of mandamus should not issue, directed to the justices of the peace for the county of *Leicester*, commanding them to proceed upon the appeal of the inhabitants of *Stoke Golding* against an order of two justices for removing *Samuel Vincent* a pauper, his wife, and four children from *Castle Donington* to *Stoke Golding*. This was grounded upon an affidavit stating, that in *January* last this order of removal was made, and notice of appeal given; that the inhabitants of *Castle Donington* discovering that the woman was not the pauper's wife, and so the children illegitimate, and therefore their settlement could not be derived from him in *Stoke Golding*, agreed to

take

take the paupers, *Sarah* and the children, back again; and did accordingly take them back; and the order of removal as to them was considered to be at an end. That afterwards, and before the Sessions, a new order was made, removing *Sarah* and the children from *Castle Donington* to *Sibston*; against which *Sibston* appealed; and the Sessions were of opinion that the former order of removal not having been regularly appealed from, and quashed, was conclusive on *Stoke Golding*, and for that reason were proceeding to quash the second order of removal to *Sibston*. That the attorney for *Stoke Golding* happening to be in court then desired that *their* appeal against that first order might be heard; but the justices refused, (although it was the first session after the order made.) He then proposed that the Sessions would permit the case to be stated for the opinion of the Court of King's Bench, whether the first order under these circumstances were conclusive: but this was also refused. The Court granted a rule to shew cause.

“ Mr. *Bearcroft* and Mr. *Dayrell* in the next term shewed cause, on the ground that it is the custom at *Leicester* for all appeals to be entered on the first day of the sessions; but this was presented afterwards: and that agreeing to take the party back was nothing.

“ Mr. Justice *BULLER* said, they ought to have proceeded on the appeal: they were bound to receive it: it was presented at the next sessions. *Per Cur.* Rule absolute for mandamus.”]

The Court said, that the application was a reasonable one, and they ought to grant it. The parish officers of *North Bradley* were prepared to enter their appeal at the

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proper time, and were only prevented from doing so by the agreement of the other parish, which then rendered it unnecessary. No fault was imputable to them. The mandamus therefore should go to the justices to receive and enter the appeal nunc pro tunc, and enter continuances.

Rule absolute.

Thursday,
June 25th.

SPENCER *against* HALL.

Where a defendant residing in town at the issuing of the writ changes his residence permanently to the country, at the distance of above 40 miles from town, before the delivery of the issue, he is entitled to 14 days' notice of trial.

THIS was a rule calling upon the plaintiff to shew cause why the verdict obtained by him in this cause should not be set aside with costs for irregularity. The venue was laid in *Middlesex*; and the defendant was living there at the time of issuing the writ; but before the delivery of the declaration he quitted that residence, and went to reside permanently at *Worcester*: and notice of this was given to the plaintiff's attorney before the declaration was delivered: notwithstanding which the issue was delivered on the 11th of *May*, with notice of trial for the sittings after last *Easter* term, which commenced on the 19th of the same month. And the question was, Whether the defendant, having a settled residence in town at the commencement of the action, though afterwards removing to the distance of above 40 miles off, was entitled to 14, or only to 8 days notice of trial.

Garrow and *Marryat* shewed cause, and contended for the shorter period, on account of the uncertainty that would generally ensue if the length of the notice were to depend upon the defendant's change of residence subsequent

quent to the issuing of the writ, which might not be known beforehand to the plaintiff, who would thereby lose the opportunity of giving 14 days notice. And this they said had been the general practice; and that the cases in which it had been otherwise considered were where the residence in town at the commencement of the action was only occasional.

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Lawes, in support of the rule, denied that the general practice was such as had been represented. The statute 14 Geo. 2. c. 17. s. 4. on which the question turns has no reference to the commencement of the action; but only directs, "that no cause shall be tried at nisi prius, &c. or at the sittings in *London* or *Westminster*, where the defendant resides above 40 miles from the said cities, unless notice of trial in writing has been given at least ten days (and the practice of the Court requires fourteen) before such intended trial." In *Brind v. Torris* (a) all the antecedent stages of the cause arose in *London*; but yet it was ruled that fourteen days notice of trial was necessary, the defendant having ceased to reside in town before the delivery of the issue. And this was recognized in *Douglas v. Ray* (b).

Lord KENYON C. J. (after consulting the other Judges) said, that as this was a question upon the construction of the act of parliament which concerned the practice of all the courts, it should be referred to the Master to inquire into the practice, and confer with the officers of the other courts, in order that all might be regulated by one uniform rule; and then to make his report upon it.

(a) 2 *Blac. Rep.* 1205.

(b) 4 *Term Rep.* 552.

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Upon the last day of the term (a) the Master reported, that he had conferred with the officers of the other courts, and they all agreed that the practice was for the defendant to have the longer notice of trial in these cases.

Rule absolute.

(a) The matter was discussed some days before.

THE END OF TRINITY TERM.

AN INDEX OF THE PRINCIPAL MATTERS.

A

A BATEMENT.

See PLEADING, No. 5. 7.

ACCEPTANCE OF GOODS. .

See ASSUMPSIT, No. 4.

ACTION ON THE CASE.

See AGREEMENT.

1. The defendant having had a credit lodged with him by a foreign house in favour of one *W. T.* to a certain amount, upon an express stipulation that *W. T.* should previously lodge in his hands goods to treble the amount; and being applied to by the plaintiffs for information respecting the responsibility of *W. T.* answered that he knew nothing of *W. T.* himself, but what he had learned from his correspondent; but that *he had a credit lodged with him for so much by a respectable house at H. which he held at W. T.'s disposal, (omitting the condition,) and that upon a view of all the circumstances*

which had come to his (the defendant's) knowledge, the plaintiffs might execute W. T.'s order with safety; viz., an order for the sale and delivery of goods on credit. In an action on the case to recover damages incurred by the plaintiffs in consequence of having trusted W. T. on this representation; held, that there was a material suppression of the truth, and evidence sufficient for the jury to find fraud, which is the gist of the action; although the defendant had no immediate interest in making the false representation; and though at the time when it was made, he added, that he gave the advice without prejudice to himself. Eyre v. Dunisford, 111. 41 Geo. 3.

2. An action does not lie against individuals for acts erroneously done by them in a corporate capacity, ~~from~~ which detriment happens to the plaintiff; at least not without proof of malice. *Harman v. Tappenden*, Trin. 41 G. 3.

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3. In an action against a returning officer for refusing a vote at an election of members to serve in parliament, malice must be proved as well as laid. Semble that charging that the defendant knowing, &c. and wrongfully intending to deprive plaintiff, &c. hindered him from giving his vote, &c. is a sufficient allegation of malice. *Dreze v. Coulton, Lammington Sp. assizes, 1787, cor. Wilson J.* 507

4. Where a mob attacked a baker's house and broke the glass and shutters of the windows, and compelled him to sell flour at a price named by themselves below the marketable value; held, this was evidence for the jury of a felonious beginning to demolish the house, &c. within the 4th section of the riot act; and that the plaintiff might recover for the damage done to the house, in an action against the hundred on the 6th section, but not for the value of the flour sold, that not being consequential to the act of demolition: nor could he recover for the value of other flour taken and wasted in another warehouse distinct from his dwelling-house on the opposite side of the street, of which the lock only was burst; that not being a beginning to demolish, &c. within the act, with the view with which it appeared to be done. *Burrows v. Wright, Trin. 41 Geo. 2.* 515

5. Where a mob after beginning to demolish and pull down a house, beat their therein, or force the owner to sell it at an under price, the value thereof cannot be recovered in an action against the hundred on the 6th section of the riot act, 1 Geo. 1. c. 2. s. 5. such stealing and robbery being substantive felonies, and not within the offence created by the 4th section of the act. But flour which was spoiled or destroyed at the time of such beginning to demolish, &c. may

be so recovered. *Greaves v. Higginbotham, Trin. 41 Geo. 3.* 636

ADDITION.

1. The plaintiff, in an affidavit to hold the defendant to bail, must give himself an addition; otherwise the defendant will be discharged on common bail. *Jarrett v. Dillon, Mich. 41 Geo. 3.* 18
2. The affidavit to hold to bail is part of the process to bring the defendant into court; any irregularity must be taken advantage of in the first instance, and is waived by the defendant's putting in bail. Such affidavit ought to give the addition as well as place of abode of the party making it. *Dargatz v. Vivant, otherwise Taylor, Hil. 41 Geo. 3.* 330.

AFFIDAVIT to hold to Bail.

1. In an affidavit to hold to bail for 1190*l.* 11*s.* 3*d.* it is not enough to negative a tender of the *said* debt in bank notes; for non constat but a tender in bank notes was made of all but the fractional sum, which would be sufficient within the statute, 37 Geo. 3. c. 45. *Jennings v. Mitchell, Mich. 41 Geo. 3.* 17
2. The plaintiff, in an affidavit to hold the defendant to bail, must give himself an addition, otherwise the defendant will be discharged on common bail. *Jarrett v. Dillon, Mich. 41 Geo. 3.* 18
3. No objection can be made to the insufficiency of an affidavit to hold to bail, in not negating a tender of the debt in bank notes, after the bail have justified. *Jones v. Price, Mich. 41 Geo. 3.* 28
4. An affidavit to hold to bail, sworn by a clerk in the chamberlain of London's office, as to the existence of the debt, and that no tender of it had been made in bank notes to the best of his knowledge and belief, held sufficient.

sufficient in an action brought by the corporation. *The Mayor, &c. of London v. Dias*, Hil. 41 Geo. 3. 237

5. The affidavit to hold to bail is part of the process to bring the defendant into court; any irregularity in it must be taken advantage of in the first instance, and is waived by the defendant's putting in bail. Such affidavit ought to give the addition as well as place of abode of the party making it. *Dargent v. Vaut*, otherwise *Taylor*, Hil. 41 Geo. 3. 330
6. An affidavit to hold to bail made by the agent of the plaintiff, expressly negating a tender in bank notes of the debt to his principal, as well as to himself, is sufficient, though the plaintiff himself were not therein stated to reside abroad. *Knight v. Keyte*, East. 41 Geo. 3. 415

AGENT.

See ASSUMPSIT, No. 4.

AGREEMENT.

See STOCK, No. 1.

1. After a bargain and sale of a stack of hay between the parties on the spot, evidence that the vendee actually sold part of it to another person (by whom, though against the vendee's approbation, it was taken away,) is sufficient to warrant the jury in finding a delivery and acceptance by the vendee; thereby taking the case out of the statute of frauds. *Chaplin v. Rogers*, Hil. 41 Geo. 3. 192
2. In an action for the non-delivery of malt, which the defendant had undertaken to deliver on request at a certain price, it is sufficient for the plaintiff in his declaration to aver such request, and that he was ready and willing to receive the malt and to pay for it according to the terms of the sale, but that the defendant refused to deliver it; without aver-

ring an actual tender of the price. *Razouff v. Johnson*, Hil. 41 Geo. 3. 203

3. In assumpsit for goods sold and delivered, defendant pleaded a set off of more money due to him from the plaintiff. Replication, that the goods were agreed to be paid for in ready money, which replication was holden bad on demurrer, being no answer to the plea. *Eland v. Karr*, East. 41 Geo. 3. 375

AMENDMENT.

See PRACTICE, No. 7.

1. Leave given to amend the declaration by entitling it of the day on which it was actually delivered, instead of the term generally, in order to accord with an averment therein, that other defendants named in the writ were then outlawed. *Coutanche v. Le Ruez*, Hil. 41 Geo. 3. 133

ANNUITY.

1. A memorial under the annuity act of a bond, stating that A. and B. severally became bound, is not sufficient in law if the bond be joint, as well as several. *Willey v. Cawthorne*, East. 41 Geo. 3. 398
2. Where a former rule for setting aside an annuity was discharged, because it did not appear that an indorsement [not memorialized] containing a clause of redemption [bearing date after the deed] had been made prior to the execution of it; in which case it could not be received in evidence for want of being stamped; the court will not enter into the question on a subsequent rule; although it appear clearly that the indorsement was made before the deed was executed; and that such clause of redemption was not inserted in the memorial of the annuity enrolled according to the stat. 17 Geo. 2. c. 26. *Schumann v. Weatherhead*, Trin. 41 Geo. 3. 537

APPOINTMENT.

See POWER.

APPRENTICE.

See SETTLEMENT BY APPRENTICESHIP.

ASSUMPSIT.

See BILLS OF EXCHANGE, No. 3.

4, 5. INSURANCE, No. 1.

1. A captain of a troop, during the time of his absence, and while another officer is in the actual command of it, by whom the orders for subsistence are issued, and the subsistence money is received from government, is not liable to pay for subsistence furnished to the men though such captain was still entitled to a profit upon the sum issued on that account, and the troop still continued under his military orders.

Myrtle v. Beaver, *Hil.* 41 Geo. 3. 135

2. Where money was lent by the plaintiff to the defendant, for which a note was given on a wrong stamp; plaintiff, on parcel proof of such consideration, may recover on the money counts. *Tyte v. Jones*, *Sittings at Westminster* 1788, cor. Lord Kenyon, 56. n.

3. An action upon promises lies by a ship owner to recover from the owner of the cargo his proportion of general average loss incurred by sacrificing the tackle belonging to a ship for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern. *Birkeley v. Prosser*, *Hil.* 41 Geo. 3. 220

4. A. and B. merchants abroad, ship tobacco for Liverpool, consigned to A. himself there, to whole order the bills of lading are made, one of these bills is sent inclosed in a letter from the shippers to C. at Liverpool, advising him of such consignment to A., and that A. intended to proceed to Liverpool, but in case

he should not arrive in time desiring C. to do the best for them. The tobacco, having arrived in a damaged state before A., is required to be landed, and is deposited in the king's warehouse pursuant to the statute; and afterwards C. acting as agent for A. with the knowledge of the captain, makes an entry of it in his own name in the custom-house to avoid seizure: Held, that this was not such an acceptance of the cargo by C. as would make him liable to the captain for the freight. *Ward v. Felton*, *Trin.* 41 Geo. 3. 507

5. The captain of a troop for which forage is furnished, by the orders of a clerk appointed by such captain, is not liable in an action for money had and received for such forage, though present with the troop at the time; it not appearing that he had received any money for this purpose from the paymaster, to whom it is issued by government, and upon whom the captain is entitled to draw for a certain sum regulated by the returns of the preceding month. *Rice v. Chute*, *Trin.* 41 Geo. 3. 579
6. Aliter if he had in effect received the money. *Rice v. Everitt*, *Trin.* 41 Geo. 3. 583

ATTORNEY.

1. An attorney has a lien upon a sum awarded in favour of his client, as well as if recovered by judgment; and if after notice to the defendant the latter pay it over to the plaintiff; the plaintiff's attorney may compel a repayment of it to himself; and he shall not be prejudiced by a collusive release from the plaintiff to the defendant. *Omerod v. Tite*, *East.* 41 Geo. 3. 464

AVERAGE (GENERAL).

1. An action upon promises lies by a ship owner to recover from the owner of the cargo his proportion of general

ral average loss incurred by sacrificing the tackle belonging to a ship for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern. *Birkley v. Presgrave*, Hil. 41 Geo. 3.

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AWARD.

See LIEN, No. 3.

1. Application to set aside awards, though for objections appearing on the face of them, must be made within the time limited by the 9 & 10 W. 3. c. 15. *Lowndes v. Lowndes*, Hil. 41 Geo. 3. 276
2. Where a verdict is taken pro forma at the trial for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded is to be taken as if it had been originally found by the jury; and the plaintiff is entitled to enter up judgment for the amount, without first applying to the court for leave so to do. *Lee v. Lingard*, East. 41 Geo. 3. 401

B

BAIL.

1. In scire facias on the recognizance of bail, and scire feci returned, it is sufficient to fix the bail if they were summoned before the rising of the court on the return day. But the court will stay proceedings against both the bail, on payment of the sum sworn to and costs, although less than the damages recovered, or than the sum named in the process. *Clarke v. Bradshaw*, Mich. 41 Geo. 3. 86
- Tramll v. Rivaz*, Trin. 16 Geo. 13. S. P. there cited. 91
2. The scire facias against bail must lie four days in the office, as well where scire feci is returned as nihil. *Williams v. Mason*, Mich. 4 Geo. 2. cited 43. 89

3. Where the defendant was sued by original in London, the scire facias against the bail must be sued there also: and it does not help the plaintiff who sued out the scire facias in Middlesex, that bail had by mistake been put in there. *Harris and Another v. Calvert and Another*, Trin. 41 Geo. 3. 603

BAIL-BOND.

1. After a party arrested on civil process has been discharged on giving a bail bond to the sheriff for his appearance at the return of the writ, it is optional in the sheriff whether he will accept the surrender of the party in discharge of the bail-bond before the return of the writ; and therefore though notice of such surrender were given to the sheriff and the gaoler in whose custody the party then was at the suit of another; after which the gaoler let the party out of custody; yet held that the gaoler was not liable upon his bond of indemnity to the sheriff as for an escape in the former suit; for the party was not legally in the custody of the sheriff or his gaoler merely by virtue of such notice or surrender. *Hamilton v. Wilson*, East. 41 Geo. 3. 343

BANKRUPT.

1. A discharge under a commission of bankrupt in a foreign country is no bar to an action for debt, arising here, against the bankrupt by a creditor, a subject of this country. *Smith v. Buchanan*, Mich. 41 Geo. 3. 6
2. Money paid by one partner to another before the bankruptcy of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, if it be not so applied is proveable as a debt under the commission of the bankrupt partner; although the solvent partner were not called upon to repay the debt 3 A 4

- debt to the joint creditor till after the bankruptcy of the other. But the solvent partner may recover from the bankrupt his share of such debt so paid after the bankruptcy to the joint creditor, notwithstanding the bankrupt has obtained his certificate. *Wright v. Hunter*, Mich. 41 Geo. 3. 20
3. *A.* engages as a partner in a particular transaction with *B. C.* and *D.* who were before partners; *B. C.* and *D.* become bankrupts, after which *A.* pays a debt due from himself and them to a joint creditor; held that these three partners constituted but one debtor to *A.* and he might recover from *B.* the proportion of *B. C.* and *D.* towards the joint debt, *B.* not having pleaded in abatement. *ib.*
4. A bill of exchange payable to *A.* or order, which was legal in its inception, was by him indorsed to *B.* for an usurious consideration, who passed it to a third person for a valuable consideration, without notice of the usury, by whom it was paid to *B.*'s assignees after his bankruptcy, in satisfaction of a debt owing to the bankrupt's estate: held that the indorsement of *A.* to *B.* on an usurious account did not avoid the bill in the hands of an innocent holder, by virtue of the statute of usury, and that *B.*'s assignees, being clothed with the rights of such innocent indorsee, were entitled to hold the bill against *A.* though as between *A.* and *B.* the security was void. *Farr v. Ellison*, Mich. 41 Geo. 3. 92
5. An agreement on discounting a bill, that the plaintiff should take in part payment another bill which had time to run as cash, although the full discount was taken, is usurious. *ib.*
6. After an act of bankruptcy committed by one of two partners, joint effects are sent away, which come to the defendant's hands; then the solvent partner dies, leaving the defendant his executor; and afterwards a commission of bankrupt is taken out against the surviving partner, and his estate assigned to the plaintiffs: held that they are tenants in common with the solvent partner, and after his decease with his representatives, by relation of law from the act of bankruptcy, and cannot therefore maintain trover against the defendant claiming under such solvent partner. *Smith v. Stokes*, East. 41 Geo. 3. 363
7. After an act of bankruptcy committed by one partner, the other delivers goods of their joint property to a creditor for a joint debt, and dies; afterwards a commission issues against the surviving partner; held that the creditor, by virtue of such delivery by the solvent partner, became tenant in common of the goods with the assignees of the bankrupt, by relation from the act of bankruptcy, which was in the life time of the solvent partner, and consequently that the assignees cannot maintain trover against such creditor. *Smith v. Oriell*, East. 41 Geo. 3. 368
8. *A.* desires leave to place certain long bills in *B.*'s hands, and to be allowed permission to draw, without renewals, bills of shorter dates, and desires *B.* to calculate the sum to be drawn for, allowing commission; and the long bills indorsed by *A.* are indorsed to *B.* in the same letter. *B.* answers that agreeable to *A.*'s wishes; he had discounted the bills, and then specifies the amount to be drawn for. This transaction is not an exchange or sale of bills upon discount, but a deposit of the long bills, on condition of being allowed to draw shorter bills; and *B.* having accepted *A.*'s bills, and such acceptances being dishonoured in consequence of *B.*'s bankruptcy, and the long bills having remained in specie in *B.*'s hands at the time of his bankruptcy, and *B.*'s assignees having afterwards received

received the value of them, *A.* may recover the amount from them as money had and received to his use.

Parke v. Eliafon, Trin. 41 Geo. 3.
544

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See PARTNERS, No. 2.

1. A promissory note written upon a stamp of greater value than the proper stamp required cannot be received in evidence, though the stamp were applicable to the same kind of instrument. *Farr v. Price, Mich. 41 Geo. 3.* 55
2. A bill of exchange payable to *A.* or order, which was legal in its inception, was by him indorsed to *B.* for an usurious consideration, who passed it to a third person for a valuable consideration, without notice of the usury, by whom it was paid to *B.*'s assignees, after his bankruptcy, in satisfaction of a debt owing to the bankrupt's estate: held that the indorsement of *A.* to *B.* on an usurious account did not avoid the bill in the hands of an innocent holder, by virtue of the statute of usury; and that *B.*'s assignees, being clothed with the rights of such innocent indorsee, were entitled to hold the bill against *A.* though as between *A.* and *B.* the security was void. *Parr v. Eliafon, Mich. 41 Geo. 3.* 92
- 2b. An agreement on discounting a bill, that the party should take in part payment another bill which had time to run as cash, although the full discount was taken, is usurious. *ib.*
3. A mere promise by a debtor to his creditor, that if he would draw a bill upon him at a certain date for the amount of his demand, he should then have the money and would pay it, does not amount in law to an acceptance of the bill when drawn; and an indorsee for a valuable consideration, between whom and the

drawee no communication passed: at the time of his taking the bill, can neither recover upon the count as for an acceptance, nor on the general counts as for money had and received, &c. *Johnsen v. Collins, Mich. 41 Geo. 3.* 98

4. But when plaintiff had lent money to the defendant, for which he took a promissory note on a wrong stamp, hold, he might give parol evidence of the consideration to enable him to recover on the money counts. *Tyte v. Jones, sittings at Westminster, 1788, cor. Lord Kenyon,* 58
5. Though a note were given to a married woman, knowing her to be such, with intent that she should indorse it to the plaintiff in payment of a debt which she owed him (in the course of carrying on a trade in her own name by the consent of her husband), yet the property in the note vested in the husband by the delivery to the wife, and no interest passed by her indorsement to the plaintiff; neither can the plaintiff recover upon the money counts under such circumstances. *Barlow v. Bishop, East. 41 Geo. 3.* 432
6. A draft on a banker, post-dated, and delivered before the day of the date, though not intended to be used till that day, requires to be stamped, by the stat. 31 Geo. 3. c. 25. *Allen v. Kewers, East. 41 Geo. 3.* 435

BOND.

1. In an action on a judgment recovered on a bond, interest may be recovered in damages beyond the penalty of the bond. *McClure v. Dunkin, East. 41. Geo. 3.* 436

BRIBERY.

See INDICTMENT, No. 3.

BROKER.

1. Where an English subject, in time of war, who had received orders to

effect an insurance for a neutral foreigner, opened the policy with his usual broker, in his own name, but informing him at the same time that the property was neutral; this is a sufficient indication to the broker that the party acted as agent, and not on his own account; and therefore the broker has no lien on the policy so effected for his general balance against such agent, as between such broker and the principal. *Maans v. Henderson*, Hil. 41 Geo. 3. 335

C

CARRIER.

The defendant a common carrier to and from *B.* through *W.* to *R.* employs distinct boats to carry to and from *B.* to *R.* and to and from *B.* to *W.* which pass on different days. The plaintiff knowing this, and having corn at *W.* which is threatened to be seized by a mob, writes to the defendant at *B.* to send a private boat quickly, on account of the state of the country, to take the corn to *B.* to which the defendant not returning any answer, and plaintiff fearing to wait till the day defendant's boat would, in the usual course of employment, go from *W.* to *B.* stops the boat passing by from *R.* to *B.* and without disclosing the circumstances to the boatman, prevails on him to take the corn on board, and then dispatches him forward in the night, having privately sent orders to open the lock at any time when he should pass. After a verdict for the defendant, negating that the corn was delivered in the usual course of dealing as a common carrier; held that the verdict might be sustained, either on the general ground of fraud in the plaintiff, or on the circumstances of the case, furnishing altogether evidence of a tacit stipulation

on the part of defendant to do the best he could, but not to be answerable as a common carrier for the violence of the mob; or because it did not appear that the boatman, whose ordinary employment was between *R.* and *B.* had authority from the defendant to accept the goods at *W.* for *B.* much less to accept them in that manner. *Edwards and others v. Sherratt*, Trin. 41 Geo. 3. 604

CASES DOUBTED OR DENIED.

Webb v. Harvey, (2 Term Rep. 757) 88

CERTIORARI.

1. The Court refused a criminal information against a Magistrate for returning to a writ of Certiorari a conviction of a party, in another and more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the Magistrate's clerk, the conviction returned being warranted by the facts. *R. v. Barker*, Hil. 41 Geo. 3. 186
2. A certiorari to remove an indictment from the sessions may be sued out by the prosecutor, without giving the six days previous notice required by the statute 13 Geo. 2. c. 18. § 5. in the case of removing "convictions, judgments, orders, and other (summary) proceedings." The effect of such writ is to remove all proceedings of the nature described therein which have taken place between the teste and return, although the proceedings originated after the teste. The Magistrates below are bound to obey the writ after production of it, and notice to them in fact of such production, when sitting in their judicial capacity; and after that all further proceedings before them on the matter are erroneous. *R. v. Battams*, Hil. 41 Geo. 3. 298

COMMITMENT.

COMMITMENT.

1. A defendant, being brought up for judgment after conviction, stands committed, pending the consideration of the judgment, unless the prosecutor consent to his standing out on bail. *R. v. Waddington, Hil. 41 Geo. 3.* 159

CONDITION PRECEDENT.

- See* AGREEMENT, No. 2. COVENANT, No. 3.

CONSIGNOR AND CONSIGNEE.

See STOPPING *in transitu*.

CONTINUANCE DAY.

See PRACTICE, No. 10.

CONVICTION.

1. The Court refused a criminal information against a Magistrate for returning to a writ of Certiorari, a conviction of a party in another and more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the Magistrate's clerk, the conviction returned being warranted by the facts. *R. v. Barker, Hil. 41 Geo. 3.* 186
2. Where an act gives power to a Magistrate on a summary conviction to award the *reasonable* charges of taking a distress, he must ascertain the amount in the conviction; and an adjudication that the defendant shall pay the *reasonable charges* of the levy is bad. *R. v. Symonds, Hil. 41 Geo. 3.* 189
3. A conviction on the stat. 5. Geo. 3. s. 34. for fishing without consent of the owner, "in part of a certain stream which runneth between B. in the parish of A. in the county of W. and C. in the same parish and county," quashed, because it did not appear that the intermediate course of the stream between the

two termini in which the offence was alleged to be committed was in the county of W. and within the jurisdiction of the convicting Magistrate. *R. v. Edwards, Hil. 41 Geo. 3.* 188

4. If a conviction before a Justice of Peace on the game laws state that the defendant was present at the time when the information was read and the witnesses examined, and that when called on for his defence, he produced no evidence, and did not require any farther time; that is sufficient, without stating that he was previously summoned to answer, &c. *Rex v. Stone, Trin. 41 Geo. 3.* 639

5. *Qu.* Whether it be necessary for the prosecutor to negative by evidence, as well as in the information, the qualifications of the defendant to kill game?—and *Qu.* Whether the negative of such qualifications must be repeated in the adjudicatory part of the conviction, or whether it be not sufficient to convict the defendant of the offence *asore said*, referring to the previous part of the conviction, which sets forth the information in which such qualifications were specifically negatived. *Rex v. Stone, Trin. 41 Geo. 3.* 639
6. A conviction wherein the information does not negative the defendant's qualifications set forth in the statute 22 c. 23. Car. 2. is bad. *Rex v. Jarvis, Hil. 30 Geo. 2. cited.* 643
7. Whether the conviction should not state expressly that the evidence was given in the defendant's presence. Dub. per Lord Kenyon in *R. v. Stone, Trin. 41 Geo. 3.* 648

COPYHOLD.

1. A covenant to surrender a copyhold to a purchaser, and to make and do all acts, deeds, &c. for the perfect surrendering and assuring the premises

misfer at the costs and charges of the seller, is not broken by non-payment of the fine to the Lord on the admission of the purchaser; for the title is perfected by the admittance of the tenant, and the fine is not due till after the admittance. *Graham v. Sime*, Trin. 41 Geo. 3. 632

COPYRIGHT.

1. An action lies to recover damages "for pirating the new corrections and additions to an old work." *Cary v. Longman and Rees*, East. 41 Geo. 3. 358
2. No such action lies for publishing sea charts on an improved and more useful principle, with material corrections, though many of the lines were copied from old charts. *Sayre v. Moore*, sittings after Hil. 25 Geo. 3. n. 361
3. But the action lies for a servile imitation of parts of a book of chronology, though other parts of the book were different. *Dr. Truster v. Murray*, sittings after Mich. 30 Geo. 3. n. 363

CORPORATION.

1. If it appear with sufficient certainty to the Court, that a person has been elected Mayor of a borough on the days appointed by the usage, who is not qualified to accept the office, by reason of his not having previously taken the sacrament within the time limited by law, they will grant a mandamus to the electors to proceed to a new election under the stat. 11 Geo. 1. c. 4. § 2. as if no election had in fact been made. *Rex v. Corporation of Bedford*, Mich. 41 Geo. 3. 79
2. An action does not lie against individuals for acts erroneously done by them in a corporate capacity, from which detriment happens to the plaintiff, at least not without proof

of malice. *Harman v. Tappenden*, Trin. 41 Geo. 3. 555

COSTS.

1. After a venire de novo awarded upon an imperfect special verdict, and a new trial granted after a verdict for the plaintiff on the second trial, and the jury find again for the plaintiff on the third trial, he is only entitled to the costs of the last trial, unless it be otherwise expressed in the rule granting the new trial. *Bird v. Appleton*, Mich. 41 Geo. 3. 111
2. Where in trespass quare cl. fr. the defendant pleads not guilty, and a justification of a right of way, and the plaintiff traverses the right of way, and new assigns extra viam; and there is a verdict for the plaintiff with 1s. damages on the new assignment, and for the defendant on the justification; the plaintiff is entitled to full costs, deducting the defendant's costs on the issue found for him. *Martin v. Vallance*, East. 41 Geo. 3. 350
3. To a plea of set-off of a sum due under a recognizance, and also of another sum upon a simple contract, it seems that a replication, protesting that the plaintiff did not acknowledge, &c. and then pleading that he was not indebted in manner and form as the defendant had in pleading alleged, and concluding to the country, is bad; inasmuch as it refers matter of record to the cognizance of a jury. But as it was a sham plea, the plaintiff had leave to amend without payment of costs. *Solomons v. Lyon*, East. 41 Geo. 3. 389
4. If one of the plaintiffs reside within reach of the process of the Court, security will not be required for the costs, though the other plaintiff be a foreigner residing abroad, and though the first mentioned plaintiff be a bankrupt in execution for debt. *McConnell v. Varlett & al.* East. 41 Geo. 3. 431

5. An attorney has a lien upon a sum awarded in favour of his client, as well as if recovered by judgment: and if after notice to the defendant the latter pay it over to the plaintiff, the plaintiff's attorney may compel a repayment of it to himself; and he shall not be prejudiced by a collusive release from the plaintiff to the defendant. *Ormerod v. Tate, East.*

41 Geo. 3. 464

6. Where an insufficient answer is given to a rule nisi for a mandamus to a corporation to restore a freeman improperly disfranchised, in consequence of which a peremptory mandamus issues to restore him, no costs are recoverable by stat. 9 Ann. c. 20. *Hargrave v. Tappenden, Trin. 41 Geo. 3.*

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COURTS MARTIAL.

1. Courts martial are bound by the same rules of evidence as the courts of common law; and their general proceedings, where not otherwise regulated by act of parliament, must follow the same course. The case of the mutineers of the *Bounty*, ship of his Majesty (cited). 313
Mr. Stratford's case. *ib.*

COVENANT.

1. A covenant to and with *A.*, his executors, administrators, and assigns, and to and with *B.* and his assigns, to pay an annuity to *A.*, his executors, &c. during *B.*'s life, is a joint covenant to *A.* and *B.*, in which they have a joint legal interest, although the benefit be for *A.* only; and therefore on the death of *A.* the right of action survives to *B.*, and *A.*'s administrator cannot sue on the covenant. *Anderson v. Martindale, Trin. 41 Geo. 3.* 497

2. A grant by lessors for lives of all their estate, right, title, interest, &c. in the premises to one and his executors, habendum to him and his ex-

ecutors for 99 years, if ~~the~~ lives should so long exist, in as large, ample, and beneficial way, &c. as the grantors, their heirs, &c. held, is no assignment of the freehold, and consequently not of the whole interest of the grantors in their lease; and therefore the reversioners (the lives being expired within the term) cannot maintain covenant against the under-lessee for not delivering up the premises in good repair. *Earl of Derby v. Taylor, Trin. 41 Geo. 3.* 502

3. *A.* covenants that he will on or before a certain day convey to *B.*, by such conveyance as *B.*'s counsel should advise, all the ground before conveyed to him by *C.* In consideration of which *B.* covenants to pay a certain sum, and reserve certain rents, &c. to *A.*, and to lay out a certain sum on the premises; held, that *A.* cannot maintain covenant against *B.* without averring such a conveyance, or a readiness to convey to *B.* on or before the day all the land, but that *B.* prevented him by some act or neglect of his. And it is not sufficient to maintain covenant to shew that after the day *B.* accepted a conveyance of ground, rents in lieu of part of the land, and accepted that and the conveyance of the other part in lieu of the conveyance covenanted to be made by *A.*; for this is a substitution of a different agreement by parol, to which the covenant does not apply. *Heard v. Watts, Trin. 41 Geo. 3.* 619

4. A covenant to surrender a copyhold to a purchaser, and to make and do all acts, deeds, &c. for the perfect surrendering and assuring the premises at the costs and charges of the seller, is not broken by non-payment of the fine to the lord on the admittance of the purchaser; for the title is perfected by the admittance of the tenant, and the fine is not due till after the admittance. *Graham v. Sime, Trin. 41 Geo. 3.* 632

CROSS

CROSS REMAINDERS.

See DEVISE, No. 3.

1. Cross remainders cannot be implied in a deed; and can only be raised by proper words of limitation; however plainly expressed the intention of the parties may be. Under a limitation in a marriage settlement, to the use of all and every the daughter and daughters of, &c. to be begotten, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters; and for default of such issue, to the right heirs, &c. held that there were no cross remainders between the daughters or their issue. *Doe v. Worsley, East.* 41 Geo. 3.

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D

DEED.

See CROSS REMAINDERS, No. 1.

DELIVERY OF GOODS.

See EVIDENCE, No. 3. STOPPING *in transitu.*

DEPOSIT.

1. *A.* desires leave to place certain long bills in *B.*'s hands, and to be allowed permission to draw without renewals bills of shorter dates, and and desires *B.* to calculate the sum to be drawn for, allowing commission: and the long bills indorsed by *A.* are inclosed to *B.* in the same letter. *B.* answers that agreeable to *A.*'s wishes he had discounted the bills, and then specifies the amount to be drawn for. This transaction is not an exchange or sale of bills upon discount, but a deposit of the long bills on condition of being allowed to draw shorter bills: and *B.* having accepted *A.*'s bills, and such accept-

ances being dishonoured in consequence of *B.*'s bankruptcy, and the long bills having remained in specie in *B.*'s hands at the time of his bankruptcy, and *B.*'s assignees having afterwards received the value of them; *A.* may recover the amount from them as money had and received to his use. *Parker v. Eliason and Others, Trin.* 41 Geo. 3. 544

DEVISE.

See LIMITATION.

1. *E. C.* by his will, after making several pecuniary bequests, devised to *A. W.* the income of a certain cottage and her living in it if she thought proper; and to *E. W.* the half of a certain estate; and "all the rest and residue of his goods, &c. and also his lands, &c. he gave to his wife for life, with power " to " give what she thought proper of " her said effects" to her sisters the said *A.* and *E. W.* for their lives: and after the death of his wife and her two sisters he gave all his lands, &c. to his heir at law. Held that the widow had power to devise to her sisters the real as well as personal estate before bequeathed to her by her husband; and *A. W.* having died before the widow, that the latter might among the rest bequeath the cottage, in which *A. W.* had a life interest, to her other sister *E. W.* *Doe d. Chilcott v. White, Mich.* 41 Geo. 3. 33
2. *A.* devised a reversionary estate to *S. T.* and *A. L.* as tenants in common in fee; and in case both or either of them should happen to die in the lifetime of *T. H.* (who had an estate for life in the premises), then the share or shares of her or them to dying to go " unto all and " every such child and children, " grandchild and grandchildren, of " the said *S. T.* and *A. L.* respectively, as should be living at the " time

“ time of her or their decease, and
 “ to the issue of such of them
 “ as should be then dead, and have
 “ left issue, and to his, her, and
 “ their respective heirs, as tenants
 “ in common; yet, nevertheless, so
 “ as all the descendants of the said
 “ S. T. should together be entitled
 “ only to one moiety of the said
 “ premises, and all the descendants
 “ of the said A. L. should together
 “ be entitled to no more than the
 “ other moiety thereof; and that
 “ none of such descendants, either
 “ of S. T. or A. L. should be en-
 “ titled to any greater or other
 “ share of the said respective moi-
 “ ties of the said respective pre-
 “ mises, than his, her, or their fa-
 “ ther or mother would have been
 “ entitled to, if living;” under this
 “ devise the grandchildren of S. T.
 “ and A. L., though in esse at the date
 “ of the will, can only take per stirpes,
 “ and not per capita, in substitution of
 “ such of their parents respectively as
 “ happened to be dead at the deter-
 “ mination of T. H.’s life estate. *La-*
gard v. Harworth, Mich. 41 Geo. 3.

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3. A devise of a messuage and land to
 R. C. for the term only of his natu-
 ral life, and after his decease to the
 issue of the said R. C. as tenants in
 common; but in case the said R. C.
 shall die without leaving issue; then
 a devise of the same to E. H. in fee;
 gives to R. C. an estate tail in order
 to effectuate the general intent. And
 cross remainders cannot be implied
 between the issue of R. C. *Doe d.*
Coek v. Cooper, Hil. 41 Geo. 3. 229

4. Under a devise to A. of all the tes-
 tator’s whole estate and effects, real
 and personal, &c. “ who shall hold
 “ and enjoy the same as a place of
 “ inheritance to her and her children,
 “ or her issue for ever. And if it
 “ should happen that A. should die,
 “ leaving no child or children, or
 “ A.’s children should die without

“ issue,” then over; held, that A.
 took an estate tail. *Wood & ux. v.*
Baron, Hil. 41 Geo. 3. 259

5. Under a devise to A. for her natural
 life, without impeachment of waste,
 remainder to trustees to preserve con-
 tingent remainders, remainder to the
 heirs male of the body of A. to be be-
 gotten, severally, successively, and in
 remainder one after another, accord-
 ing to seniority, &c. the elder of
 such sons and the heirs male of his
 body being always preferred before
 the younger of such son and sons; and
 the heirs male of their bodies; and in
 default of such issue, to the daughter
 and daughters of the body of A. as
 tenants in common in tail, remainder
 over; held A. only took an estate for
 life, and that the words heirs male of
 her body were explained by the sub-
 sequent words to mean first and other
 sons. *Doe d. Sweet v. Herrings Hil.*
 41 Geo. 3. 264

6. The words heirs male of the body may
 be construed to be words of purchase,
 if they are clearly so intended to be.
ib.

7. Under a devise of “ a messuage or
 “ tenement, buildings, lands, or
 “ premises, now in my own possession;
 “ and all other my real estate whatso-
 “ ever, in M. or in any other place,”
 &c. to A. for life; and after her
 decease a devise of “ the said, mes-
 “ suage or tenement, buildings,
 “ lands, and premises,” to B. in fee;
 held, that the word premises, used in
 the devise to B., carried all that was
 before given to A., and was not con-
 fined to the premises in the testator’s
 own possession; and consequently that
 a reversion in fee of another mes-
 suage, to which the testator was en-
 titled after the determination of a
 life in being, in whose possession it
 was outstanding during his lifetime,
 passed to the devisee in remainder.
Doe v. Meakin, East. 41 Geo. 3.

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DISTRESS.

1. Trespass lies against a landlord, who on making a distress for rent turned the plaintiff's family out of possession, and kept the premises on which he had impounded the distress. *Ether-ton v. Peppercorn*, Hil. 41 Geo. 3.

139

E

EJECTMENT.

1. Ejectment will not lie for a messuage and tenement. *Doe v. Plowman*, East. 41 Geo. 3.

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ELECTION.

See CORPORATION, No. 1.

ELY, Isle of, Jurisdiction.

See JURISDICTION, No. 2.

ENGROSSING.

See FORESTALLING.

ERROR, WRIT OF.

See PRACTICE, No. 12.

ESCAPE.

See SHERIFF, No. 1.

EVIDENCE.

See WAY, No. 1, 2.

1. The examination of a soldier touching his settlement, which is made evidence by the mutiny act, must be authenticated before it can be received in evidence, and does not prove itself *prima facie*, though the paper appear to be in the form prescribed by the statute. *Rex v. Inhabitants of Dilton with Harrowgate*, Mich. 41 Geo. 3.
2. Semble the handwriting of the magistrates signing the examination ought instead to be proved.

13

ib.

3. Where goods are ponderous and incapable of being handed over by actual delivery, it may be done by that which is tantamount, as by delivering the key of a warehouse in which they are. Therefore, after a bargain and sale of a stack of hay between the parties on the spot, evidence that the vendee actually sold part of it to another person, by whom, though against the vendee's approbation, it was taken away, is sufficient to warrant the jury in finding a delivery to and acceptance by the vendee; thereby taking the case out of the stat. of frauds. *Chaplin v. Rogers*, Hil. 41 Geo. 3.

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4. Where a public statute for erecting a court of inferior jurisdiction, enacts that "no action for any debt not amounting to 40s. and recoverable by that act shall be brought against any person residing within the jurisdiction," &c. such statute is a defence upon the general issue to a party bringing himself within it, who is sued in the superior courts. *Parker v. Elding*, East. 41 Geo. 3.

352

5. A verdict against one defendant in trespass upon an issue of a justification of a public right of way, negating such right, is evidence in trespass for breaking and entering the same close against another defendant, who justified under the same right. And the latter cannot shew that such verdict was entered upon that particular plea by mistake of the officer, there having been no evidence given on either side in respect of that issue on the former trial; the record being conclusive as to the fact of such a finding, though not as to the truth of it between other parties. *Reed v. Jackson*, East. 41 Geo. 3.

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6. Reputation would be evidence as to the right of way in such case.

ib.

7. An ex parte examination in writing of a pauper, taken on oath before two magistrates, for the purpose of removing

removing

removing him to the place of his settlement, is not admissible in evidence upon an appeal against an order of removal, on the ground of the pauper's having absconded between the notice of appeal and the trial of it before the quarter sessions; although the respondents had used due diligence, but without effect, to procure the attendance of the pauper as a witness; he not having been heard of from the time of his absconding. *Rex v. Nuneham Courtney, East. 41 Geo. 3.* 373

8. Where the plaintiff entered an account in writing of goods and cash furnished to the defendant from time to time, each page of which was authenticated by the defendant's acknowledgment in writing of the receipt of the contents; though such an acknowledgment in writing cannot be given in evidence *per se*, in respect to the cash items, amounting to above 40*s.* in each page, for want of a receipt stamp, yet it is competent to the plaintiff to prove that upon calling over each article to the defendant, he admitted that he had received the same; and the witness may refresh his memory by referring to the accounts. *Jacob v. Lindsay, East. 41 Geo. 3.* 460

EXAMINATION.

See EVIDENCE, No. 5.

EXECUTION.

1. Process sued out by the crown against a defendant to recover penalties, upon which judgment for the crown is afterwards obtained, entitles the king's execution to have priority within the stat 33 *Hen 8. c. 39. s. 74.* before the execution of a subject, whose execution had issued and been commenced on a judgment recovered against the same defendant prior to the king's judgment, but subsequent to the commencement of the king's

process: the king's writ of execution having been delivered to the sheriff before the actual sale of the defendant's goods under the plaintiff's execution. *Butler v. Butler, Hil. 41 Geo. 3.* 338
Attorney-General v. Aldersey, Mich. 1780, S. P. *ib.*

F

FALSE REPRESENTATION.

See ACTION ON THE CASE, No. 1.

FEME COVERT.

1. The court will discharge a feme covert on common bail, though at the time of the credit given to her by the plaintiff, she mistakenly informed him that her husband was dead; there being no fraud intended. *Pitt v. Thompson, Mich. 41 Geo. 3.* 16
2. *38* where the plaintiff at the time of the credit given to the defendant knew that she had a husband living abroad, though separated from him by consent. *March v. Capelli, Hil. 39 Geo. 3.* *n. 17*
3. Though a note were given to a married woman, knowing her to be such, with intent that she should indorse it to the plaintiff in payment of a debt which she owed him, (in the course of carrying on a trade in her own name by the consent of her husband,) yet the property in the note veiled in the husband by the delivery to the wife, and no interest passed by her indorsement to the plaintiff; neither can the plaintiff recover upon the money counts under such circumstances. *Barlow v. Bishop, East. 41 Geo. 3.* 432

FINE.

1. One tenant in common levying a fine of the whole, and taking the rents and profits afterwards without account

account for nearly five years is no evidence from whence the jury should be directed (against the justice of the case) to find an ouster of his companion at the time of the fine levied; and consequently the latter may maintain ejectment without making an actual entry. *Peaceable d. Hornblower v. Read and another*, Trin. 41 Geo. 3. 568

FISHERY.

See CONVICTION, No. 3.

FOREIGN LAWS.

See BANKRUPT, No. 1.

FORESTALLING, ENGROSSING, &c.

The following were declared to be offences at common law, and not done away by the repeal of the Stat. 5. & 6. Ed. 6. c. 14.

1. Spreading rumours with intent to enhance the price of hops, in the hearing of hop planters, dealers, and others, that the stock of hops was nearly exhausted, and that there would be a scarcity of hops, &c. with intent to induce them not to bring their hops to market for sale for a long time, and thereby greatly to enhance the price. *R. v. Waddington*, Hil. 41 Geo. 3. 143
2. Spreading such rumours generally, with intent to enhance the price of hops. *ib.*
3. Endeavouring to enhance the price by persuading divers dealers, &c. not to take their hops to market, and to abstain from selling for a long time. *ib.* 144
4. Engrossing large quantities of hops, by buying from many particular persons by name, certain quantities, with intent to re-sell the same for an unreasonable profit, and thereby to enhance the price. *ib.*
4. Ad idem, stating the particular contracts. *ib.*
6. Getting into his hands large quantities, by contracting with various persons for the purchase, with intent to prevent the same being brought to market, and to re-sell at an unreasonable profit, and thereby greatly to enhance the price. *ib.*
7. Buying large quantities with like intent. *ib.* 145
8. Buying large quantities with intent to re-sell at exorbitant profit, &c. *ib.*
9. Unlawfully engrossing, by buying large quantities with like intent. *R. v. Waddington*, Hil. 41 Geo. 3. *ib.*
10. Engrossing hops of divers persons by name, with intent to re-sell at an unreasonable profit, and thereby enhance the price. *R. v. Waddington*, Hil. 41 Geo. 3. 167
11. Engrossing hops then growing, by forehand bargains, with like intent. *ib.*
12. Buying large quantities of hops of divers persons mentioned, with intent to prevent their being brought to market, and to re-sell them at an unreasonable profit, and thereby enhance the price. *ib.* 168
13. Buying all the growth of hops in several parishes by forehand bargains, with the like intent. *ib.*
14. Buying hops of divers persons with intent to re-sell at an unreasonable profit, and thereby enhance the price. *ib.* 168
15. Buying all the growth of hops on certain lands in certain parishes, by forehand bargains, with intent to sell at an unreasonable price and to enhance the price. *ib.*
16. Endeavouring to enhance the price of hops, by persuading hop owners not to sell, &c. 169
17. Engrossing, by buying large quantities of persons unknown, with intent to re-sell at an exorbitant profit, &c. *ib.*
18. Buying large quantities with like intent. *ib.*
19. Buying

19. Buying hops then growing, with intent to re-sell at an exorbitant price and lucre. *Rex v. Waddington, Hil. 41 Geo. 3.* 169
20. To forestall any commodity which is become a common victual and necessary of life, or used as an ingredient in the making or preservation of any victual, though not formerly used or considered as such, is an offence at common law. *ib.*
21. Indictment for engrossing a great quantity of fish, geese, and ducks, held bad, without specifying the quantity of each. *R. v. Gilbert, Trin. 41 Geo. 3.* 583

FORGERY.

1. The Sessions have no jurisdiction over the offence of forgery at common law, nor can they take cognizance of it as a cheat. *R. v. Micah Gibbs, Hil. 41 Geo. 3.* 173
2. Therefore they cannot hold cognizance of an indictment charging that the defendant being a person assented to certain duties granted upon income, by certain Commissioners, and under pretence of being aggrieved, having appealed to certain other Commissioners, and contriving and intending to deceive the said Commissioners, and to induce them to believe that the particulars of his income delivered in, and the deductions claimed by him to be allowed, had been inquired into, examined, and approved by one Richard Elfe, then being clerk to the first mentioned Commissioners, and with a fraudulent intent to give effect to his appeal, and to evade the duty, at the bottom of a paper purporting to be a schedule of the defendant's income, did forge, &c. the letters R. E. purporting to be the initials of the said clerk, and did exhibit to the Commissioners of Appeal the said paper, &c. against the peace, &c. *ib.*
3. Indictment charging that defendant having in his possession a bill of ex-

- change, purporting to be directed to one J. King, by the name and description of J. Ring, forged the acceptance of the said J. King, &c. is bad; because *purport* means what appears on the face of the instrument, and the bill did not purport to be drawn on J. King. *R. v. Reading, O. B. 1793.* 180 n.
- R. v. Gilbert, O. B. 1795, S. P. ib.*
4. So where the indictment charged that the bill purported to be directed to Richard Down, Henry Thornton, John Evans, and John Cornwall, jun. by the name and description of Messrs. Down, Thornton, & Co. *R. v. Esdaile, Southampton Sp. Ass. 1798. ib.*
 5. An indictment for forgery must set out the forged instrument in words and figures. *R. v. Mason, Northumberland Sum. Ass. 1792. ib.*
 6. But upon an indictment for publishing a forged receipt for money, with the name Stephen Withers, &c. for the sum of 1l. 4s. it was holden sufficient to set forth only the receipt itself as follows: "18th March 1773. Received the contents above, by me Stephen Withers;" without setting forth the account itself to which such receipt referred, and at the foot of which it was subscribed; that account being only evidence to make out the charge. *R. v. Taffick, Bodmin Sum. Ass. 1774. ib.*

181

FREIGHT.

1. A and B. merchants abroad, ship tobacco for Liverpool, consigned to A. himself there, to whose order the bills of lading are made. One of these bills is sent inclosed in a letter from the shippers to C. at Liverpool, advising him of such consignment to A., and that A. intended to proceed to Liverpool; but in case he should not arrive in time, desiring C. to do the best for them. The tobacco having arrived in a damaged

state before *A.* is required to be landed, and is deposited in the King's warehouse, pursuant to the statute; and afterwards *C.* acting as agent for *A.* within the knowledge of the Captain, makes an entry of it in his own name in the Custom-house, to avoid seizure. Held that this was not such an acceptance of the cargo by *C.* as would make him liable to the Captain for the freight. *Ward v. Felton*, Trin. 41 Geo. 3. 507

G

GAOLER.

See SHERIFF, No. 1.

GENERAL ISSUE.

See EVIDENCE, No. 4.

GIBRALTAR.

See MUTINY ACT.

GRANT.

1. A grant by lessees for lives of "all their *land, right, title, interest, &c.* in the premises to one and his executors, habendum to him and his executors for 99 years, if the lives should so long live, in as large, ample, and beneficial way, &c. as the grantors, their heirs, &c. held, is no assignment of the freehold, and consequently not of the *whole* interest of the grantors in their lease; and therefore the reversioners (the lives being expired within the term) cannot maintain covenant against the under lessee for not delivering up the premises in good repair. *E. of Derby v. Taylor*, Trin. 41 Geo. 3. 502

GLEBE.

1. One in possession of glebe land under a lease void by the stat. 13 Eliz.

c. 20, by reason of the rector's non-residence, may yet maintain trespass upon his possession against a wrong doer. *Graham v. Peat*, Hil. 41 Geo. 3. 244

H

HABEAS CORPUS. (*return to*)

1. By the mutiny act the King may make articles of war, and constitute Courts Martial with power to try and punish, as well in *Great Britain, &c.* as in *Gibraltar, &c.* By a subsequent clause no soldier shall, by such articles of war, be subjected to the punishment of death or loss of limb within *Great Britain, &c.* (omitting *Gibraltar*), for any crime not expressed to be so punishable by the act. Then, by the articles of war, persons found guilty by a Court Martial at *Gibraltar*, of these, robbery, &c. or of having used violence, or committed any offence against the persons or property of others, "shall suffer death, or such other punishment, according to the nature and degree of the offence, as by the sentence of such Court Martial shall be awarded;" held that the Court Martial have a discretionary power by such words, and are not restricted to pass such sentence on a delinquent as would be warranted by the law of *England*. But supposing they were, yet that a return to a habeas corpus, stating that upon a certain charge exhibited against the defendant before such a Court, for certain offences alleged to have been committed by him at *Gibraltar*, such proceedings were had, that the Court Martial, after hearing the charge and the defence, found the defendant guilty of receiving certain goods named, from the warehouse of *W.* (at *G.*) knowing them to be stolen, in breach of the articles of war, whereupon they sentenced him to

to transportation for fourteen years, is good. For such a sentence would be warranted here by the stat. 4 Geo. 1. c. 11. if the principal were convicted of the felony, and the receiver were indicted as accessory after the fact. *R. v. Suddis*, Hil. 41 Geo. 3. 300

2. It seems a sufficient return to a habeas corpus, that the defendant is in custody under the sentence of a Court of competent jurisdiction to inquire of the offence, and to pass such a sentence, without setting forth the particular circumstances necessary to warrant such a sentence. *ib.*

HUNDRED.

1. Where a mob attacked a baker's house, and broke the glass and shutters of the windows, and compelled him to sell flour at a price named by themselves, below the marketable value; held, this was evidence for the jury of a felonious beginning to demolish the house, &c. within the fourth section of the riot act; and that the plaintiff might recover for the damage done to the house, in an action against the hundred on the 6th section, but not for the value of the flour so sold, that not being consequential to the act of demolition; nor could he recover for the value of other flour taken and wasted in another warehouse distinct from his dwelling-house on the opposite side of the street, of which the lock only was burst; that not being a beginning to demolish, &c. within the act, with the view with which it appeared to be done. *Burrows v. Wright*, Trin. 41 Geo. 3. 615
2. Where a mob, after beginning to demolish and pull down a house, steal flour therein, or force the owner to sell it at an under price, the value thereof cannot be recovered in an action against the hundred on the 6th section of the riot act, 1 Geo. 1.

stat. 2. c. 5. such stealing and robbery being substantive felonies, and not within the offence created by the 4th section of the act. But flour which was spoiled or destroyed at the time of such beginning to demolish, &c. may be so recovered. *Greasley v. Higginbotham*, Trin. 41 Geo. 3. 636

H O P S.

See FORESTALLING.

I

INDICTMENT. INFORMATION.

See FORESTALLING, &c. FORGERY.

1. Information granted for endeavouring to procure the appointment of certain persons to be overseers of the poor, with a view to derive a private advantage to the party. *R. v. Jolliffe*, East. 32 Geo. 3. (cited.) 154
2. The Court refused a criminal information against a Magistrate for returning to a writ of certiorari a conviction of a party in another and more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the Magistrate's clerk, the conviction returned being warranted by the facts. *R. v. Barker*, Hil. 41 Geo. 3. 186
3. Indictment lies against one who was clerk to the agent for French prisoners of war, for taking bribes in order to procure the exchange of some of them out of their turn. *R. v. Beale*, East. 38 Geo. 3. (cited.) 183
4. Indictment for engrossing a great quantity of *hul*, *gists*, *and* *ducks*, held bad, without specifying the quantity of each. *R. v. Gilbert*, Trin. 41 Geo. 3. 583

INSURANCE.

1. The premium paid on an illegal insurance to cover a trading with an enemy

- enemy cannot be recovered back, though the underwriter cannot be compelled to make good the loss. *Vandyc v. Hewitt*, Mich. 41 Geo. 3. 96
2. Where an English subject in time of war, who had received orders to effect an insurance for a neutral foreigner, opened the policy with his usual broker in his own name, but informing him at the same time that the property was *neutral*; this is a sufficient indication to the broker that the party acted as *agent*, and not on his own account; and, therefore the broker has no lien on the policy so effected for his general balance against such agent, as between such broker and the principal.—*Maans v. Henderson*, Hil. 41 Geo. 3. 335
3. It is legal to trade with the subjects of an enemy's country by the King's licence. But if it be provided in such licence, that the party acting under it shall give bond for the due exportation to the places proposed of the goods intended to be exported to such country, and they are exported without such bond being given, such exportation is illegal, and the owners cannot recover on a policy to protect the goods. *Vandyc v. Whitmore*, East. 41 Geo. 3. 475
4. If a licence to export and deliver goods to an enemy's country be granted for a limited time, it is not sufficient that the goods were shipped before the expiration of the time, the ship not sailing till afterwards. *ib.*
5. Where an act prohibiting intercourse with America, then in a state of rebellion, enabled the British Commanders to grant licences in a certain form to carry provisions to places in America occupied by the British, and a licence was granted not following the requisitions of the act, it was holden void; and consequently the trading being illegal, the goods sent under the licence could not be insured. *Vanbarthals v. Halbed*, Mich. 31 Geo. 3. n. 487
5. An assured upon an American ship and cargo, provided with such a passport as is required by the treaty between America and France, and with all other usual American papers and documents, is entitled to recover against an underwriter of a policy on such ship and goods, in case of a capture by a French privateer, notwithstanding a sentence of condemnation of the same as lawful prize by a French Court of Admiralty; such sentence proceeding on the ground of a breach of French ordinances, requiring certain particulars to be observed in respect of the ship documents beyond what was necessary by the treaty. *Price v. Bell*, Trin. 41 Geo. 3. 663
7. Qu. Whether if a ship be not warranted of any particular country, there be an implied warranty in a policy of insurance that she shall be properly documented according to the laws of that country, and her particular treaties with foreign states. *Price v. Bell*, Trin. 41 Geo. 3. 663

INTEREST.

1. Execution cannot be taken out for interest upon a sum awarded to be paid on a particular day, and for which sum judgment was entered up. But it is in the province of the jury (or the arbitrator interposed in their place) to allow interest or not in the damages. *Lee v. Lingard*, East. 41 Geo. 3. 401
2. In an action on a judgment recovered on a bond, interest may be recovered in damages beyond the penalty of the bond. *McCure v. Dunkin*, East. 41 Geo. 3. 436

J

JOINDER IN ACTION.

See COVENANT, No. 1.

1. To

1. To a declaration against one upon joint promises by him and another, whom he avers to be outlawed, a plea of nul tiel record of outlawry is in effect a plea in abatement, for want of parties; and therefore, if it conclude in bar, it is bad on general demurrer, and the plaintiff is entitled to judgment quod recuperet, &c. *Nowlan v. Geddes, Trin. 41 Geo. 3.* 634

JOINT AND SEVERAL COVENANT.

See COVENANT, No. 1.

JUDGMENT.

See AWARD, No. 2.

1. To a plea in abatement of misnomer of plaintiff, replication that the plaintiff was known as well by the one name as the other: upon demurrer over-ruled, there must be judgment of respondeas ouster, and not quod recuperet. *Bowen v. Shapcott, Trin. 41 Geo. 3.* 542
2. To a declaration against one upon joint promises by him and another, whom he avers to be outlawed, a plea of nul tiel record of outlawry is in effect a plea in abatement, for want of parties; and therefore, if it conclude in bar, it is bad on general demurrer, and the plaintiff is entitled to judgment quod recuperet, &c. *Nowlan v. Geddes, Trin. 41 Geo. 3.* 634

JURISDICTION.

1. A certiorari to remove an indictment from the sessions may be sued out by the prosecutor, without giving the six days previous notice required by the stat. 13. Geo. 2. c. 18. § 5. in the case of removing "convictions, judgments, orders, and other summary proceedings." The effect of such writ is to remove all proceedings of the nature described therein

which have taken place between the teste and return, although the proceedings originated after the teste. The Magistrates below are bound to obey the writ after production of it, and notice to them in fact of such production, when sitting in their judicial capacity; and after that all further proceedings before them on the matter are erroneous. *R. v. Battams, Hil. 41 Geo. 3.* 298

2. Where a public statute for erecting a Court of Inferior Jurisdiction enacts that "no action for any debt not amounting to 40s. and recoverable by that act shall be brought against any person residing within the jurisdiction," &c. such statute is a defence upon the general issue to a party bringing himself within it, who is sued in the superior Courts. *Parker v. Elding, East. 41 Geo 3.* 353

K

KEELMAN.

See PRESSING.

LANDLORD AND TENANT.

See DISTRESS, No. 1.

LARCENY AND ROBBERY.

1. Where a mob attacked a baker's house, and broke the glass and shutters of the windows, and compelled him to sell flour at a price named by themselves, below the marketable value; held, this was evidence for the jury of a felonious beginning to demolish the house, &c. within the 4th section of the riot act; and that the plaintiff might recover for the damage done to the house, in an action against the hundred, on the 6th section, but not for the value of the flour so sold; that not being consequential to the act of demolition; nor could he recover for the value of other

other flour taken and wasted in another warehouse distinct from his dwelling-house on the opposite side of the street, of which the lock only was burst; that not being a beginning to demolish, &c. within the act, with the view with which it appeared to have been done. *Burrows v. Wright and Another*, Trin. 41 Geo. 3.

615

2. Where a mob, after beginning to demolish and pull down a house, steal flour therein, or force the owner to sell it at an under price, the value thereof cannot be recovered in an action against the hundred, on the 6th section of the riot act, 1 Geo. 1. A. 2. c. 5. such stealing and robbery being substantive felonies, and not within the offence created by the 4th section of the act. But flour which was spoiled or destroyed at the time of such beginning to demolish, &c. may be so recovered. *Greasley v. Higginbotham*, Trin. 41 Geo. 3.

636

LEASE.

1. A grant by lessees for lives of all their estate, right, title, interest, &c. in the premises to one and his executors, habendum to him and his executors for 99 years, if the lives should so long live, in as large, ample, and beneficial way, &c. as the grantors, their heirs, &c. held, is no assignment of the freehold, and consequently not of the whole interest of the grantors in their lease; and therefore the reversioners, (the lives being expired within the term,) cannot maintain covenant against the under lessee for not delivering up the premises in good repair. *Earl of Derby v. Taylor*, Trin. 41 Geo. 3.

502

LICENCE.

See TRADING WITH ENEMY.

LIEN.

1. One who has a lien on goods in his possession, if he afterwards deliver them to a ship carrier to be conveyed on account and at the risk of his principal, though unknown to the carrier, cannot recover his lien by stopping the goods in transitu, and procuring them to be re-delivered to him by virtue of a bill of lading signed by the carrier in the course of his voyage. *Swett v. Pym*, Mich. 41 Geo. 3.
2. Where an English subject in time of war, who had received orders to effect an insurance for a neutral foreigner, opened the policy with his usual broker in his own name, but informing him at the same time, that the property was neutral; this is a sufficient indication to the broker that the party acted as agent, and not on his own account, and therefore the broker has no lien on the policy to effected for his general balance against such agent, as between such broker and the principal. *Maans v. Henderjon*, Hil. 41 Geo. 3.
3. An attorney has a lien upon a sum awarded in favour of his client, as well as if recovered by judgment: and if after notice to the defendant the latter pay it over to the plaintiff, the plaintiff's attorney may compel a re-payment of it to himself: and he shall not be prejudiced by a collusive release from the plaintiff to the defendant. *Ormerod v. Tate*, East. 41 Geo. 3.
4. Quære, Whether a captain of a ship parts with his lien on goods for his freight by depositing them in the king's warehouse, pursuant to the requisitions of an act of parliament? *Ward v. Felton*, Trin. 41 Geo. 3.

512

LIME-WORKS.

See POOR RATE, No. 1.

LIMITA-

LIMITATION.

1. Cross-remainders cannot be implied in a deed; and can only be raised by proper words of limitation; however plainly expressed the intention of the parties may be. Under a limitation in a marriage settlement to the use of all and every the daughter and daughters of, &c. to be begotten, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters; and for default of such issue to the right heirs, &c. held, that there were no cross-remainders between the daughters or their issue. *Doe v. Worley*, *East*. 41 *Geo.* 3. 416
2. A power of appointment under a marriage-settlement, unto and among all or any the child or children of the marriage, for such estates as the husband and wife, or the survivor of them, should from time to time, either with or without power of revocation, direct, limit, or appoint, may be executed by the survivor, after a joint appointment, reserving to them and the survivor a power of revocation and appointment. But under such power, if the second appointment be to the daughter of the marriage for life, remainder to the eldest son for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons in tail, &c. remainder to the daughter in fee; all the limitations subsequent to that to the eldest son for life are void, as being an excess beyond the power; and the ultimate remainder dependant upon such intermediate limitations, though made in favour of one of the objects of the power, is also void; and shall not be accelerated by the event of such void intermediate limitations not having taken effect, for want of issue male of the eldest son, &c. to whom the appointment was made. For an ap-

pointment not good in its creation, will not become so by subsequent circumstances. And such an appointment being by deed, cannot be construed cypress, so as to give the sons estates tail, as perhaps might have been the case if the appointment had been by will. *Brudenell v. Elwes*, *East*. 41 *Geo.* 3. 442

3. There may be a limitation to one unborn for life only, but not to the issue of such an one for life. *Id.* 452

M

MANDAMUS.

1. If it appear with sufficient certainty to the court, that a person has been elected mayor of a borough on the day appointed by the usage, who is not qualified to accept the office, by reason of his not having previously taken the sacrament within the time limited by law, they will grant a mandamus to the electors to proceed to a new election under the stat. 11 *Geo.* 1. c. 4. s. 2. as if no election had in fact been made. *Rex v. The Corporation of Bedford, Mich.* 41 *Geo.* 3. 79
2. Though by the stat. 9 *Ann.* c. 20. s. 2. the prosecutor of a mandamus to which there is a return, and issue taken on the facts therein, had an option to try the question in the same county in which he might have brought an action for a false return; yet if all the material facts are alleged in one county, and issue taken thereon there, he cannot issue the venire facias into another county, though he might originally have alleged the facts there, and have there brought his action for a false return. *Rex v. The Mayor, &c. of Newcastle, Mich.* 41 *Geo.* 3. 114
3. The stat. 35 *Geo.* 3. c. 101. s. 2. after enabling justices to suspend orders of removal of poor persons, and

to order the charges thereby incurred to be defrayed by the pauper's parish; and to direct the charges to be levied by warrant of distress, enacts, that if the parties against whom it is issued are out of the jurisdiction of the justice granting the warrant, it shall be indorsed by some other justice within whose jurisdiction they are: this is peremptory upon the latter upon request made. *Rex v. Kynaston*, Mich. 41 Geo. 3. 117

4. Where the father and son were removed from A. to B. by two several orders of removal; and the parish-officers of A. and B. agreed that the removal of the son should follow that of the father, without the expence of a separate appeal; in consequence of which an appeal was only entered against the order removing the father; and after the sessions had determined that the father was settled in A., and had quashed that order, A. refused to take back the son; B. R. granted a mandamus to the sessions to receive and determine the appeal against the order removing the son, though at a subsequent sessions to that holden next after the order of removal made; the appeal being directed to be entered nunc pro tunc with proper continuances. *Rex v. The Justices of Wiltshire*, Trin. 41 Geo. 3. 683

5. A mandamus was granted to the sessions to receive an appeal which was presented during the next sessions after an order of removal made, though not presented till after the day on which, by the practice of that sessions, appeals were required to be entered. *Rex v. The Justices of Essex*, East. 23 Geo. 3. n. 686

MASTER AND SERVANT.

17. A master is not liable in trespass for the wilful act of his servant, as by driving his master's carriage against another, done without the direction

or assent of the master. But he is liable to answer for any damage arising to another from the negligence or unskillfulness of his servant acting in his employ. *McManus v. Crickett*, Mich. 41 Geo. 3. 106

MILITARY OFFICER.

1. A captain of a troop, during the time of his absence, and while another is in the actual command of it, by whom the orders for subsistence are issued, and the subsistence-money is received from government, is not liable to pay for subsistence furnished to the men; though such captain was still entitled to a profit upon the sum issued on that account, and the troop still continued under his military orders. *Myrtle v. Beaver*, Hil. 41 Geo. 3. 135

2. The captain of a troop for which forage is furnished by the orders of a clerk appointed by such captain, is not liable in an action for money had and received for such forage, though present with the troop at the time; it not appearing that he had received any money for this purpose from the paymaster, to whom it is issued by government; and upon whom the captain is entitled to draw for a certain sum regulated by the returns of the preceding month. *Rice v. Chute*, Trin. 41 Geo. 3. 579

3. Aliter, if he had in effect received the money. *Rice v. Everett*, Trin. 41 Geo. 3. 583

MONOPOLY.

See FORESTALLING.

MUTINY-ACT.

See SETTLEMENT.—EVIDENCE, No. 1.

1. By the mutiny-act the king may make articles of war and constitute courts martial with power to try and punish

punish as well in *Great Britain, &c.* as in *Gibraltar, &c.* By a subsequent clause no soldier shall by such articles of war be subjected to the punishment of death or loss of limb within *Great Britain, &c.* (omitting *Gibraltar*,) for any crime not expressed to be so punishable by the act. Then by the articles of war persons found guilty by a court martial at *Gibraltar* of theft, robbery, &c. or of having used violence, or committed any offence against the persons or property of others, "shall suffer death or such other punishment, according to the nature and degree of the offence, as by the sentence of such court-martial shall be awarded:" held that the court-martial have a discretionary power by such words, and are not restricted to pass such sentence on a delinquent as would be warranted by the law of *England*. But supposing they were, yet that a return to a habeas corpus, stating that upon a certain charge exhibited against the defendant before such a court, for certain offences alleged to have been committed by him at *Gibraltar*, such proceedings were had that the court-martial, after hearing the charge and the defence, found the defendant guilty of receiving certain goods named, from the warehouse of *W.* (at *G.*) knowing them to be stolen, in breach of the articles of war, whereupon they sentenced him to transportation for 14 years, is good. For such a sentence would be warranted here by the stat. 4 Geo. 1. c. 11. if the principal were convicted of the felony, and the receiver were indicted as accessory after the fact. *Rex v. Suddis*, Hil. 41 Geo. 3. 306

O

OFFICE.

A bond given by a schoolmaster of an ancient public school, who had a

freehold in his office, to resign at the request of his patron, is good at law; but equity will restrain any improper use of it by the patron. *Legg v. Lewis*, East. 41 Geo. 3. 391

ORDER OF JUSTICES.

See *WAY*, No. 1.

P

PARTNERS.

1. Money paid by one partner to another before the bankruptcy of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, if it be not so applied, is proveable as a debt under the commission of the bankrupt partner; although the solvent partner were not called upon to repay, the debt to the joint creditor till after the bankruptcy of the other. But the solvent partner may recover from the bankrupt his share of such debt so paid, after the bankruptcy, to the joint creditor, notwithstanding the bankrupt has obtained his certificate. *Wright v. Hunter*, Mich. 41 Geo. 3. 20. *A.* engages as a partner in a particular transaction with *B.*, *C.*, and *D.*, who were before partners; *B.*, *C.*, and *D.* become bankrupts, after which *A.* pays a debt due from himself and them to a joint creditor; held that these three partners constituted but one debtor to *A.*, and that he might recover from *B.* the proportion of *B.*, *C.*, and *D.* towards the joint debt; *B.* not having pleaded in abatement. *ib.*
2. Two (of three) partners, who had contracted a debt prior to the admission of the third partner into the firm, cannot bind him without his assent by accepting a bill drawn by the creditor in their joint names: but such security is fraudulent and void as against the third partner, and

and cannot be recovered in an action against the three, wherein one only of the original partners pleaded to the action. *Sbirreff v. Wilks*, Mich. 41 Geo. 3. 48
Vide Gregson v. Hutton and another, B. R. East. 22 Geo. 3.; and Marsh v. Vanommer and another, Guilball, Mich. 1786. (cited) *ib.* 49

3. After an act of bankruptcy committed by one of two partners, joint effects are sent away, which come to the defendant's hands; then the solvent partner dies, leaving the defendant his executor; afterwards a commission of bankrupt is taken out against the surviving partner, and his estate assigned to the plaintiffs: held that they are tenant in common with the solvent partner, and after his decease, with his representatives, by relation of law from the act of bankruptcy, and cannot therefore maintain trover against the defendant claiming under such solvent partner. *Smith v. Stokes*, East. 41 Geo. 3. 403

4. After an act of bankruptcy committed by one partner, the other delivers goods of their joint property to a creditor for a joint debt, and dies; and afterwards a commission issues against the surviving partner: held that the creditor, by virtue of such delivery by the solvent partner, became tenant in common of the goods with the assignees of the bankrupt by relation from the act of bankruptcy which was in the lifetime of the solvent partner; and consequently that the assignees cannot maintain trover against such creditor. *Smith v. Oriell*, East. 41 Geo. 3. 368

PATRON.

See RESIGNATION BOND, No. 2.

PLEADING.

See SET OFF, WAY, No. 2. 3.

1. Leave given to amend the declaration by entitling it of the day on which it was actually delivered, instead of the term generally; in order to accord with an averment therein, that other defendants named in the writ were then outlawed. *Contanche v. Le Ruez*, Hil. 41 Geo. 3. 133

2. In an action for the non-delivery of malt, which the defendant had undertaken to deliver on request at a certain price, it is sufficient for the plaintiff in his declaration to aver such request, and that he was ready and willing to receive the malt, and to pay for it according to the terms of the sale, but that the defendant refused to deliver it; without averring an actual tender of the price. *Rawson v. Johnson*, Hil. 41 Geo. 3. 203

3. In trespass for taking and driving the plaintiff's cattle, to which there was a justification, that the defendant was lawfully possessed of a certain close, and that he took the cattle there damage feasant; the plaintiff may specially reply title in another, by whose command he entered, &c. and it does not vitiate the replication that it unnecessarily proceeded farther to give colour to the defendant. *Taylor v. Eastwood*, Hil. 41 Geo. 3. 212

4. To a plea of set-off of a sum due under a recognizance, and also of another sum upon a simple contract, it seems that a replication, protesting that the plaintiff did not acknowledge, &c. and then pleading that he was not indebted in manner and form as the defendant had in pleading alleged, and concluding to the country, is bad; inasmuch as it refers matter of record to the cognizance of a jury. But as it was a sham plea, the plaintiff had leave to amend without payment of costs. *Solomons v. Lyon*, East. 41 Geo. 3. 369

5. To a plea in abatement of misnomer of plaintiff, replication that the plaintiff

- plaintiff was known as well by the one name as the other: upon demurrer over-ruled, there must be judgment of respondeas ouster, and not quod recuperet. *Bowen v. Shopcott*, Trin. 41 Geo. 3. 542
6. In an action against a returning officer for refusing a vote at an election of members to serve in Parliament, malice must be proved as well as laid. Semble that charging that the defendant knowing, &c. and wrongfully intending to deprive plaintiff, &c. hindered him from giving his vote, &c. is a sufficient allegation of malice. *Drewe v. Coulton*, *Launceston* Sp. assizes, 1787. (cited) n. 563
7. To a declaration against one upon joint promises by him and another whom he avers to be outlawed, a plea of nullo record of outlawry is in effect a plea in abatement, for want of parties; and therefore if it conclude in bar, it is bad on general demurrer, and the plaintiff is entitled to judgment quod recuperet, &c. *Norulan v. Geddes*, Trin. 41 Geo. 3. 634

PIRATING.

See COPYRIGHT.

POOR.

See REMOVAL.

1. The stat. 35 Geo. 3. c. 101. § 4. which provides that after the passing of the act, no person who shall come into any parish shall gain a settlement by being rated to any tenement under 10l. a-year value, extends to persons who were in the parish at the time of the passing of the act. *R. v. The Inhabitants of Ilington*, Hil. 41 Geo. 3. 233

POOR RATE.

1. Lime works are rateable in the hands of the occupier, though there

be risk and expence in the working, and the profits be uncertain. *Rex v. The Churchwardens, &c. of Albury*, Trin. 41 Geo. 3. 534

2. The objects of a charitable foundation in the actual occupation of the alms-house and lands for their own benefit in the manner prescribed by the rules of the institution, and liable to be discharged for any breach of such rules, are rateable in respect of such occupation. *R. v. Munday and others*, Trin. 41 Geo. 3. 584

POWER.

1. A power of appointment under a marriage settlement unto and among all or any the child or children of the marriage, for such estates as the husband and wife, or the survivor of them, should from time to time, either with or without power of revocation, direct, limit, or appoint, may be executed by the survivor, after a joint appointment, reserving to them and the survivor a power of revocation and appointment. But under such power, if the second appointment be to the daughter of the marriage for life, remainder to the eldest son for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons in tail, &c. remainder to the daughter in fee; all the limitations subsequent to that to the eldest son for life are void, as being an excess beyond the power; and the ultimate remainder dependant upon such intermediate limitations, though made in favour of one of the objects of the power, is also void, and shall not be accelerated by the event of such void intermediate limitations not having taken effect, for want of issue male of the eldest son, &c. to whom the appointment was made. For an appointment not good in its creation will not become so by subsequent circumstances: and such an appointment being by deed cannot be construed

frued cypress, so as to give the sons estates tail, as perhaps might have been the case if the appointment had been by will. *Brudenell v. Elwes*, *East. 41 Geo. 3.* 342

PRACTICE.

See ADDITION, No. 1. AMENDMENT. COSTS. PRISONER.

1. The Court will discharge a feme covert on common bail, though at the time of the credit given to her by the plaintiff, she mistakenly informed him that her husband was dead; there being no fraud intended. *Pitt v. Thompson*, *Mich. 41 Geo. 3.* 16
So where the plaintiff knew that the defendant had a husband living abroad, though under terms of separation from him. *March v. Capelli*, *Hil. 39 Geo. 3.* n. 17
2. A prisoner who is supersedeable, for want of filing a bill against him in time, waves the irregularity by afterwards pleading. *Pearson v. Rawlings*, *Mich. 41 Geo. 3.* 77
3. No objection can be made to the insufficiency of an affidavit to hold to bail in not negating a tender of the debt in bank notes, after the bail have justified. *Jones v. Price*, *Mich. 41 Geo. 3.* 81
4. Regulation concerning the time for delivering paper books in cases entered for argument; those entered for Friday to be delivered to the Judges on the Tuesday preceding, and those entered for Tuesday on the Saturday preceding; with such marginal notes as are directed by rule of *Hil. 36 Geo. 3.* *Reg. Gen. Trin. 40 Geo. 3.* 131
5. Service of rules, &c. after 10 o'clock at night, shall not be valid. *Reg. Gen. Mich. 41 Geo. 3.* 132
6. Where plaintiff withdraws his record after entering it for trial, the defendant may have judgment as in

case of nonsuit. *Burton v. Harrison*, *Hil. 41 Geo. 3.* 346

7. Where a sham plea was put in to which the plaintiff in reply pleaded ill, he had leave to amend without payment of costs. *Solomons v. Lyon*, *East. 41 Geo. 3.* 369
8. After party arrested on civil process has been discharged on giving a bail bond to the Sheriff for his appearance at the return of the writ, it is optional in the Sheriff whether he will accept the surrender of the party in discharge of the bail bond before the return of the writ; and therefore though notice of such surrender were given to the Sheriff and the gaoler in whose custody the party then was at the suit of another; after which the gaoler let the party out of custody; yet held that the gaoler was not liable upon his bond of indemnity to the Sheriff, as for an escape in the former suit; for the party was not legally in the custody of the Sheriff or his gaoler merely by virtue of such notice of surrender. *Hamilton v. Wilson*, *East. 41 Geo. 3.* 383
9. Where a verdict is taken pro forma at the trial, for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded is to be taken as if it had been originally found by the jury; and the plaintiff is entitled to enter up judgment for the amount, without first applying to the Court for leave so to do. *Lee v. Lingard*, *East. 41 Geo. 3.* 401
- 9 b. But the defendant against whom execution is taken out is not liable to pay interest on the sum awarded; that being in the province of the arbitrator (or a jury) to allow or not in the damages. *ib.*
- 9 c. Nor is the defendant liable to pay the Sheriff's poundage, or other fees and costs of the levy. *ib.*
10. If the plaintiff's attorney sign judgment, and file the committur piece with the clerk of the judgments within the second term after trial

trial had and verdict obtained against a prisoner, that is a sufficient charging him in execution within two terms, pursuant to the rule of Court of Hilary, 26 Geo. 3. though the final judgment and the committitur be not entered of record by the officer of the Court till the *continuance* day after such second term; provided such entries be then completed. *Pearson v. Rawlings, East. 41 Geo. 3.* 405

11. Filing and entry of committitur against prisoners. *East. 41 Geo. 3.* See PRISONER, No. 4. 410

12. Where a defendant, under an order to plead issuably, puts in a sham demurrer to some of the counts in the declaration, and pleads issuably as to the rest, the plaintiff may consider the whole as a nullity, and sign judgment as for want of a plea. *Cunning v. Sharland, East. 41 Geo. 3.* 411

13. No rules entered in the peremptory paper shall be enlarged during the term, or put off from the appointed day, by the consent of counsel, of the attornies, without leave of the Court. *Reg. Gen. East. 41 Geo. 3.* 497

14. After conviction on a criminal information, to which objections were taken, the defendant must stand committed pending the consideration of the judgment, unless the prosecutor expressly consent to his standing out on bail. *R. v. Waddington, Hil. 41 Geo. 3.* 159

15. An affidavit of excuse, however slight, for not proceeding to trial, is sufficient to discharge a rule for judgment as in case of a nonsuit, in a *qui tam* as well as any other action. *Stone v. Farey, Trin. 41 Geo. 3.* 554

16. Where the defendant was sued by original in London, the scire facias against the bail must be sued there also: and it does not help the plaintiff, who sues out the scire facias in

Middlesex, that bail had by mistake been put in there. *Harris and another v. Calvert and another, Trin. 41 Geo. 3.* 603

17. Where a plaintiff has closed his case in evidence at the trial, and the defendant has entered on his defence, it is discretionary in the Judge whether he will let the plaintiff into other evidence on a collateral point which was not in controversy between the parties, in order to carry a verdict against the merits of the principal question. *Edwards v. Sherratt, Trin. 41 Geo. 3.* 604

18. A writ of error allowed is a superseas in law to all further proceedings in the Court below; and therefore proceedings were set aside with costs for irregularity where the *ca. fa.* being returnable on a day after the allowance of the writ was returned after notice of such allowance on the same day, and *sci. fa.* afterwards taken out against the bail. *Miller v. Newbald, Trin. 41 Geo. 3.* 662

19. Where a defendant residing in town at the issuing of the writ changes his residence permanently to the country, at the distance of above 40 miles from town, before the delivery of the issue, he is entitled to 14 days notice of trial. *Spencer v. Hall, Trin. 41 Geo. 3.* 688

PREMIUM.

See INSURANCE, No. 1.

PREROGATIVE.

1. Process sued out by the Crown against a defendant to recover penalties, upon which judgment for the Crown is afterwards obtained, entitles the King's execution to have priority within the stat. 33 Hen 8. c. 39. § 74. before the execution of a subject, whose execution had issued and been commenced on a judgment recovered against the same defendant, prior-

prior to the king's judgment, but subsequent to the commencement of the king's process; the king's writ of execution having been delivered to the sheriff before the actual sale of the defendant's goods under the plaintiff's execution. *Butler v. Butler*, *Hil. 41 Geo. 3.* 338
Attorney General v. Aldersey, *Mich. 1786, S. P.* *ib.* 341

PREScription.

See WAY, No. 2.

PRESSING.

1. A keelman employed in navigating down the river Tyne to the port of Shields, at the mouth of that river, is liable to be impressed, and cannot afterwards bring himself within the protection of the 13 Geo. 2. c. 17. §. 2. exempting every person, not having before used the sea, who shall bind himself apprentice to serve at sea, from being impressed for three years from such binding. *Ex parte Soffly*, *East. 41 Geo. 3.* 466

PRISONER.

1. A prisoner who is supercedable, for want of filing a bill against him in time, waves the irregularity by afterwards pleading. *Pearson v. Rawlings*, *Mich. 41 Geo. 3.* 77
2. The rule of court of the 4 Geo. 2. requiring an attorney to be present on behalf of a prisoner at the time of his executing a warrant of attorney to confess judgment, does not apply to a case where the party was in custody at the time at the suit of a third person. *Smith v. Burlton*, *Hil. 41 Geo. 3.* 241
3. If the plaintiff's attorney sign judgment, and file the committur piece with the clerk of the judgments within the second term after trial had and verdict obtained against a prisoner, that is a sufficient charging him in execution within two terms, purlu-

ant to the rule of court of *Hilary*, 26 Geo. 3.; though the final judgment and the committur be not entered of record by the officer of the court till the continuance day after such second term; provided such entries be then completed. *Pearson v. Rawlings*, *East. 41 Geo. 3.* 405

4. Every committur on a judgment against a prisoner shall be filed with the clerk of the dockets on or before the last day of the term, in which the prisoner is charged in execution: and the clerk shall enter the committur on the judgment roll within four days next after the end of such term, exclusive of the last day of the term; unless the last of such four days be Sunday, and then within five days, &c. and in default thereof the prisoner shall be discharged. *Reg. Gen. East. 41 Geo. 3.* 410

PROMOTIONS AND RESIGNATIONS.

WILLIAM MACKWORTH PRAED, Esq. called Serjeant. 348
 Lord ELDON resigned the Chief Justiceship of the Court of C. B. and appointed Lord High Chancellor; vice Lord Loughborough, who resigned, and was created Earl of Rosslyn. 349
 Sir RICHARD PEPPER ARDEN, Knt. resigned the Rolls, and was appointed Lord Chief Justice of C. B. and created a Peer by the title of Lord Alvanley. 349
 Sir JOHN MITFORD, Knt. resigned the office of his Majesty's Attorney-General, and was elected Speaker of the House of Commons. 349
 EDWARD LAW, Esq. appointed Attorney-General and Knighted. 350
 Sir WILLIAM GRANT, Knt. resigned the office of his Majesty's Solicitor-General, and was appointed Master of the Rolls. 350
 The Honorable SPENCER PERCEVAL appointed Solicitor-General. 350

Q

QUO WARRANTO, *Information in Nature of.*

1. It is no objection to relators applying for a quo warranto information against the defendant for exercising the office of an alderman (his election to which they had opposed), that they afterwards made no opposition to his election to the principal office of magistracy, (to which the other was a necessary qualification); or that they afterwards attended at and concurred in corporate meetings whereat he presided or whereat he attended in his official character; such application being made within the time limited by law, viz. in 4 years after the defendant's election as an alderman. *Rex v. Clarke, Mich. 41 Geo. 3.* 36
2. It seems that though such an information may be granted on the relation of a stranger to the corporation; yet he ought to make out a very strong case for the interference of the court. *Rex v. Kemp, Hil. 29 Geo. 3.* n. 46

QUI TAM ACTION.

See PRACTICE, No. 15.

R

RATE.

See POOR RATE.

RECTOR.

See RESIGNATION BOND, No. 2.

REMAINDERS.

See CROSS-REMAINDERS.

REMOVAL (*Poor*).

1. The stat. 35 Geo. 3. c. 101. s. 4. which provides that after the passing

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of the act, no person who shall come into any parish shall gain a settlement by being rated to any tenement under 10l. a-year value, extends to persons who were in the parish at the time of the passing the act. *Rex v. The Inhabitants of Islington, Hil. 41 Geo. 3.* 283

REMOVAL, ORDER OF.

See MANDAMUS, No. 4.

1. The stat. 35 Geo. 3. c. 101. s. 2. after enabling justices to suspend orders of removal of poor persons, and to order the charges thereby incurred to be defrayed by the pauper's parish, and to direct the charges to be levied by warrant of distress, enacts, that if the party against whom it is issued are out of the jurisdiction of the justice granting the warrant, it shall be indorsed by some other justice within whose jurisdiction they are; this is peremptory upon the latter upon request made. *Rex v. Hynaston, Mich. 41 Geo. 3.* 117

RESIGNATION BOND.

1. A bond given by a schoolmaster of an ancient public school, who had a freehold, in his office, to resign at the request of his patron, is good at law; but equity will restrain any improper use of it by the patron. *Ligh v. Lewis, East. 41 Geo. 3.* 391
2. Held by B. R. that the ordinary of the diocese may not refuse to admit a clerk to a rectory to which he was presented, because he had given a general bond to resign upon the request of his patron: but this judgment was reversed in Dom. Proc. *Bishop of London v. Ffytche, Mich. 23 Geo. 3.* 487

RETURNING OFFICER.

1. In an action against a returning officer for refusing a vote at an election

3 C

tion of members to serve in parliament, malice must be proved as well as laid. Semble, that charging that the defendant knowing, &c. and wrongfully intending, &c. to deprive plaintiff, &c. hindered him from giving his vote, &c. is a sufficient allegation of malice. *Drew v. Coulton*. Launceston Sp. Ass, 1787, cor. *Wilson*, J. n. 563

ROBBERY.

See LARCENY and ROBBERY.

S

SACRAMENT.

See CORPORATION, No. 1.

SCHOOLMASTER.

See RESIGNATION BOND, No. 1.

SEAMEN.

See PRESSING.

SERVANT.

See MASTER.

SESSIONS.

See MANDAMUS, No. 4, 5.

1. The sessions have no jurisdiction over the offence of forgery at common law, nor can they take cognizance of it as of a cheat. *Rex v. Gibbs*, Hil. 41 Geo. 3. 173
2. But it was not denied that they had jurisdiction over cheats in general, and in *Rex v. Brayne*, Mich. 12 Geo. 1. and *Rex v. Beale*, East. 38 Geo. 3. the court of B. R. gave judgment as for a cheat on indictments respectively removed from the sessions by certiorari. ib. 183

SET-OFF.

1. In assumpsit for goods sold and delivered, defendant pleaded a set-off

of more money due to him from the plaintiff. Replication, that the goods were agreed to be paid for in ready money: which replication was holden bad on demurrer, being no answer to the plea. *Eland v. Karr*, East. 41 Geo. 3. 375

SETTLEMENT.—EVIDENCE.

1. The examination of a soldier touching his settlement, which is made evidence by the mutiny act, must be authenticated before it can be received in evidence, and does not prove itself prima facie, though the paper appear to be in the form subscribed by the statute. *Rex v. The Inhabitants of Bilton with Horrogate*, Mich. 41 Geo. 3. 13
2. An ex parte examination in writing of a pauper, taken on oath before two magistrates, for the purpose of removing him to the place of his settlement, is not admissible in evidence upon an appeal against an order of removal, on the ground of the pauper's having absconded between the notice of appeal and the trial of it before the quarter sessions; although the respondents had used due diligence, but without effect, to procure the attendance of the pauper as a witness, he not having been heard of from the time of his absconding. *Rex v. Nancham Courtney*, East. 41 Geo. 3. 393
3. A certificate directed to the parish of A., or any other in C., will operate upon delivery to the parish of B., which is also in C. By the stat. 8 & 9 W. 3. c. 30., such certificate need not be directed to any particular parish. *Rex v. Lillingston*, East. 41 Geo. 3. 438

SETTLEMENT BY APPRENTICESHIP.

1. Where the master of an apprentice told him "that he had no further employment for him, and he might

- " might go where he pleased;" and the apprentice hearing of another master, was going to him, and being met by his original master, and asked where he was going, answered that he was going to *U.*, to which the master replied, " *he might go there or where he pleased;*" held this was not such a particular assent of the original master to the service with *U.*, as would enable the apprentice thereby to gain a settlement, though the indentures were not delivered up or cancelled. *R. v. The Inhabitants of Crediton, Mich. 41 Geo. 3.* 59
2. An apprentice offered his master a guinea "to let him off," to which the master agreed, and was also to give him a suit of clothes when the guinea was paid, but the indentures were not delivered up or cancelled. The guinea not being paid, the indentures still subsisted in law, and a settlement may be gained by serving another master with the consent of the first. • The sessions ought properly to find the fact of such consent, and not merely evidence of it: but having found that on application by the apprentice to his original master for leave to serve one *B.* (who would not take him without) the master said "he might go with all his heart, "and that it would be a good thing "for him to learn the trade:" this was holden sufficient evidence to warrant the conclusion of the sessions, that the original master had consented to the particular service. *R. v. The Inhabitants of Shebbear, Mich. 41 Geo. 3.* 73
3. The pauper, an apprentice, being about to marry, told his master that he wished to provide and work for himself, to which the master consented, and said he might do the best he could for himself; but nothing was said about the indentures, and they were not in fact delivered up or cancelled; the pauper afterwards engaged to work with another master, who told the original master, that he had got the pauper at work, to which the original master answered, "I am glad of it, he was a bad lad, and could make nothing of him:" held this was not such a consent to the particular service as would confer a settlement in the parish where the pauper then lived with the second master. *R. v. The Inhabitants of St. Helen Stonegate, Hil. 41 Geo. 3.* 285
4. A contract under seal, and stamped, to serve another for three years, at so much per week, the master agreeing to learn the other a trade, and the latter agreeing, if he lost any time to the prejudice of his master, to abate so much per day, constitutes an apprenticeship. And at any rate the pauper having served under it for more than a year gained a settlement either as an apprentice, or as a hired servant. *Rex v. The Inhabitants of Rainham, Trin. 41 Geo. 3.* 538
5. A master stipulating for 4d. out of every 1s. of the earnings of his apprentice is no benefit to him within the stat. of *Anne*, for which an additional duty is to be paid, being by law entitled to the whole. *R. v. The Inhabitants of Wantage, Trin. 41 Geo. 3.* 601

SETTLEMENT—CERTIFICATE.

1. A certificate directed to the parish of *A.* or any other in *C.* will operate upon delivery to the parish of *B.* which is also in *C.* By the stat. 8 and 9 *Will. 3. c. 30.* a certificate need not be directed to any particular parish. *R. v. Lillington, East. 41 Geo. 3.* 438

SETTLEMENT BY ESTATE.

1. A pauper having a freehold estate in the parish of *A.* in the occupation
3 C 2 of

- of a tenant to whom he had let it, was deemed to gain a settlement by residing thereon 40 days with the licence of his tenant for making some repairs; such residence being considered as equivalent to a residence in any other part of the parish. *R. v. The Inhabitants of Houghton le Spring, Hil. 41 Geo. 3.* 247
2. A cottage leased for 99 years, determinable on lives, purchased by the pauper's wife before marriage, was in the lifetime of her first husband conveyed by them to a trustee in trust that he should by sale or mortgage raise 10l. (for the benefit of the parish by whom the family had been before relieved to that amount), interest and charges, and after payment of the same, in trust to re-assign the premises. The parties always continued in possession; and it did not appear whether the money were ever paid, or what was the value of the cottage. Held that on the death of the first husband, the pauper who married the widow gained a settlement by residing forty days in the cottage, of which she had retained the possession. *R. v. The Inhabitants of Edington, Hil. 41 Geo. 3.* 288
3. While the pauper resided in the parish of *B.* a freehold estate descended to his wife and her sisters, as coparceners in the same parish; and in a month after the pauper and his wife contracted to sell their share, but the conveyance was not actually executed for more than forty days after their title accrued: held that the pauper was thereby settled in *B.*, although the estate during all the time was in the occupation of another. *R. v. The Inhabitants of Dorjane, Hil. 41 Geo. 3.* 296
- learning a trade) for three years, at a certain rate of weekly wages, with a proviso that if he were prevented from working by bad weather, illness, or want of employment, there should be a proportionable deduction of wages: held that *A.* gained a settlement by serving a year under this hiring, though occasional deductions on these accounts were made. *R. v. The Inhabitants of Martham, Hil. 41 Geo. 3.* 239
2. A pensioner of the East India Company, hiring himself as a servant for a year, with a reservation to himself of two days in each half year, when he might go for his pension, cannot gain a settlement by service under such a contract. *R. v. The Inhabitants of Over, Trin. 41 Geo. 3.* 599
3. A service under a hiring by the week (the servant boarding and lodging himself), nothing being said about Sunday, but the servant working on that day occasionally, when asked by his master, without additional wages, though he sometimes received victuals, may be joined with service under a yearly hiring as a menial servant, so as to confer a settlement by hiring and service for a year. *R. v. The Inhabitants of Sutton, Trin. 41 Geo. 3.* 656

SETTLEMENT BY OFFICE.

1. The sessions finding that the pauper was legally appointed Governor of the Work-house in *I.* at an annual salary, and that the office of Governor is a public annual office, and that the pauper served it for a year: held that a settlement was thereby gained in *I.* *R. v. The Inhabitants of Ilminster, Mich. 41 Geo. 3.* 83

SETTLEMENT BY HIRING AND SERVICE.

1. *A.* clubbed with *B.* (which signifies serving another for the purpose of

SETTLEMENT BY RATING, &c.

1. The stat. 35 Geo. 3. c. 101. which provides, that after the passing of the act, no person *who shall come into* any

any parish, shall gain a settlement by being rated to any tenement under 10l. a-year value, extends to persons who were in the parish at the time of the passing the act. *R. v. The Inhabitants of Uffington, Hild.* 41 Geo. 3.

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SETTLEMENT FROM PARENTS

1. A son of age and married, continuing to live with his father, does not follow a settlement subsequently acquired by the father in another parish, to which the son also accompanied him as part in fact of his household. *R. v. The Inhabitants of Everton, Trin.* 41 Geo. 3.

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SETTLEMENT, *by taking a Tenement of 10l. a-year.*

1. The renting by a needle-maker of certain *runners* in another's mill, together with a packeting-room, of all which he had the exclusive use (a runner being a piece of machinery for scouring needles screwed down to the floor of the mill), the whole being of the annual value of above 10l. including the separate value of the *runners*, is not the taking of a tenement, whereby a settlement can be gained. *R. v. The Inhabitants of Tardiffing, Trin.* 41 Geo. 3.

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2. The occupation of a cottage for 40 days, by the leave of the former tenant, who then went out, under an agreement with him to pay the same rent to the landlord which he had before done, but without any authority from the landlord (the cottage, together with other premises occupied at the same time being 10l. a year and upwards), was holden to give the occupier a settlement. *R. v. The Inhabitants of Aldborough, Trin.* 41 Geo. 3.

59.

SHAM PLEA.

See PRACTICE, No 7.

SHERIFF.

1. After a party arrested on civil process has been discharged, on giving a bail bond to the Sheriff for his appearance at the return of the writ, it is optional in the Sheriff whether he will accept the surrender of the party in discharge of the bail bond before the return of the writ; and therefore, though notice of such surrender were given to the Sheriff, and the gaoler in whose custody the party then was at the suit of another; after which the gaoler let the party out of custody; yet held that the gaoler was not liable upon his bond of indemnity to the Sheriff, as for an escape in the former suit; for the party was not legally in the custody of the Sheriff or his gaoler, merely by virtue of such notice of surrender. *Hamilton, v. Wilson, Esq.* 41 Geo. 3.

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SHIP.

See AYERAGE, No. 1.

SOLDIER.

1. The examination of a soldier, touching his settlement, which is made evidence by the mutiny act, must be authenticated before it can be received in evidence, and does not prove itself *prima facie*, though the paper appear to be in the form prescribed by the stat. *R. v. Inhabitants of Bilton, Mich.* 41 Geo. 3.
2. Semb's handwriting of the Magistrates signing the examination ought at least to be proved, *ib.*

13

STAMP.

1. A promissory note, written upon a stamp of greater value than the proper stamp, required, cannot be received in evidence, though the stamp were applicable to the same kind of instrument.

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- instrument. *Flarr v. Price*, Mich. 41 Geo. 3. 55
- But if there were a money consideration moving between these parties for the note, parol evidence may be given of it, so as to enable the plaintiff to recover on the money counts. *Tyte v. Jones*, sittings at Westminster, 1788, cor. Lord Kenyon. (cited) *ib.*
2. A draft on a banker, post-dated and delivered before the day of the date, though not intended to be used till that day, requires to be stamped by the stat. 31 Geo. 3. c. 25. *Allen v. Keeses*, East. 41 Geo. 3. 435
3. Where the plaintiff entered an account in writing of goods and cash furnished to the defendant from time to time, each page of which was authenticated by the defendant's acknowledgment in writing of the receipt of the contents; though such acknowledgment in writing cannot be given in evidence per se, in respect to the cash items, amounting to above 40s. in each page, for want of a receipt stamp, yet it is competent to the plaintiff to prove, that upon calling over each article to the defendant he admitted that he had received the same: and the witness may refresh his memory by referring to the account. *Jacob v. Lindsay*, East. 41 Geo. 3. 460
4. An indorsement on an annuity deed, containing a clause of redemption, if made subsequent to the execution of it, must be stamped, otherwise it cannot be received in evidence. *Schumann v. Weatherhead*, Trin. 41 Geo. 3. 537
5. A master stipulating for 4d. out of every 1s. of the earnings of his apprentice is no benefit to him within the statute of *Anne*, for which an additional duty is to be paid, being by law entitled to the whole. *R. v. Inhabitants of Wantage*, Trin. 41 Geo. 3. 601
- STATUTES cited or commented upon.
- HENRY VIII.
33. c. 39. f. 74. (Extent. Priority). 338
- EDWARD VI.
5. & 6. c. 14. (Fore-stalling). 147 & c. 170 & c.
- ELIZABETH.
13. c. 20. (Rector.—Residence). 244
43. c. 2. f. 1. (Poor Rate). 588. 591
- CHARLES II.
13. f. 2. c. 1. (Sacrament). 79
13. & 14. c. 11. (Trade. Customs). 481
22. & 23. c. (Game Qualification). 630. 643
29. c. 3. f. 17. (Stat. of Frauds). 193
- WILLIAM AND MARY, AND WILLIAM.
3. c. 11. (Settlement). 83
3. & 4. c. 9. (Receivers of Stolen Goods). 309
4. & 5. c. 18. (Quo Warranto). 41
5. & 6. c. 11. (Certiorari). 300. 305
7. & 8. c. 7. (False Return). 564. 568
8. & 9. c. 30. (Settlement. Certificate). 438
- c. 33. (Certiorari). 300
9. & 10. c. 15. (Award). 276
- ANNE.
5. c. 21. f. 5. (Receiver of Goods). 309
8. c. 9. (Stamp). 601, 2
- c. 19. f. 1. (Copyright). 359
9. c. 20. f. 2. (Mandamus). 114. 559
- c. 21. (Stamp). 602
10. c. 15. (Bankrupt). 27
- GEORGE I.
1. f. 2. c. 5. f. 6. (Riot Act. Hundred). 615. 636
4. c. 11. (Felony. Receiver). 306
7. c. 31. (Bankrupt). 23
9. c. 7. (Poor Workhouse). 83

11. 2. (Charter Day.
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5. c. 19. (Certiorari). - 300
— c. 30. (Bankrupt). 23. 27
13. c. 17. f. 2. (Pressing). 406
— c. 18. f. 5. (Certiorari). 298
14. c. 17. (Nonfuit). - 346
31. c. 11. (Apprentice) - 533

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5. c. 14. (Fishery. Conviction). 278
12. c. 71. (Forefalling, &c.) 146 &c.
13. c. 78. f. 19. (Way). 64. 67
17. c. 26. (Annuity). 400. 537
— 6. 57. (Copyright). 361
18. c. 36. (Ile of Ely Jurisdiction). 352
22. c. 58 (Receiver of Stolen
Goods). - 309
31. c. 25. (Stamp). - 56. 435
32. c. 58. (Quo Warranto). 4c. 48
33. c. 27. (Trading with Enemy). 480
34. c. 9. (Ditto). - 476, &c.
— c. 79. (Ditto). - 480
35. c. 101. f. 2. (Poor. Re-
moval). - 117. 283
37. c. 45. (Bank Notes). 17
38. c. 28. (Trading with Enemy). 480
39. c. 13. (Income Duty). 173

STOCK.

An agreement to pay a per centage upon the day on which any money should be received by the defendant through the means of the plaintiff's information does not entitle the plaintiff to the stipulated reward upon the transfer of *stock*, in consequence of such information; although he might afterwards receive the dividends thereon. *Jones v. Brinley, Mich. 41 Geo. 3.*
Quere as to the dividends received which were due at the time of the transfer. 16.

STOPPING IN TRANSITU.

1. One who has a lien on goods in his possession, if he afterwards deliver

them to a ship carrier to be conveyed on account and at the risk of his principal, though unknown to the carrier, cannot recover his lien by stopping the goods in transitu, and procuring them to be re-delivered to him by virtue of a bill of lading signed by the carrier in the course of his voyage. *Sweet v. Pym, Mich. 41 Geo. 3.* 4

2. A delivery by the confignor of goods on board a ship chartered by the consignee is a delivery to him, and the confignor cannot afterwards stop them in transitu. But where the delivery was made on board such a ship in Russia, and by a law of that country, the owner of goods, in case of the bankruptcy of the vendee, may sue out process to retake his goods on board a ship, &c. and retain them till payment; and the owners hearing of the insolvency of the vendee, applied to the Captain on board of whose ship the goods had been delivered, to sign the bills of lading to their order, which he complied with, without the necessity of suing out process: held that this was a substantial compliance with such law, and that the Captain, on his arrival here, was bound to deliver the goods to the order of the vendors, and not to the assignees of the vendee, who had become bankrupt. *Inglis and others, assignees of Crane, v. Usherwood. Trin. 41 Geo. 3.* 515

TENANT IN COMMON.

See BANKRUPT, No. 6 and 7, or PARTNER, No. 3 and 4.

1. One tenant in common, levying a fine of the whole, and taking the rents and profits afterwards without account for nearly five years, is no evidence from whence the jury should be directed (against the justice of the case), to find an ouster of his companion at the time of the fine levied: and consequently the latter may main-

tain

tain ejusdem without making an actual entry. *Peaceable d. Hornblower v. Read and another*, Trin. 41 Geo. 3. 568

TRADING WITH ENEMY.

See INSURANCE, No. 1.

1. It is legal to trade with the subjects of an enemy's country by the King's licence; but if it be provided in such licence, that the party acting under it shall give bond for the due exportation to the places proposed of the goods intended to be exported to such country, and they are exported without such bond being given, such exportation is illegal, and the owners cannot recover on a policy to protect the goods. *Vandeyk v. Whitmore*, East. 41 Geo. 3. 475
2. If a licence to export and deliver goods to an enemy's country be granted for a limited time, it is not sufficient that the goods were shipped before the expiration of the time, the ship not sailing till afterwards. *ib.*
3. Where an act prohibiting intercourse with America, then in a state of rebellion, enabled the British Commander to grant licences in a certain form to carry provisions to places in America occupied by the British; and a licence was granted not following the requisitions of the act; it was holden void, and consequently the trading being illegal, the goods sent under the licence could not be insured. *Kanbarthals v. Halbed*, Mich. 31 Geo. 3. 487 n.

TRESPASS.

See WAY, No. 1.

1. A master is not liable in trespass for the wilful act of his servant, by driving his master's carriage against another, done without the direction or assent of the master; but he is liable to answer for any damage arising

to another from negligence or unskillfulness of his servant acting in his employ. *McManns v. Crickett*, Mich. 41 Geo. 3. 106

2. Trespass lies against a landlord, who, on making a distress for rent, turned the plaintiff's family out of possession, and kept the premises on which he had impounded the distress. *Etherton v. Pepplewell*, Hil. 41 Geo. 3. 159
3. The trespass for taking and driving the plaintiff's cattle, to which there was a justification that the defendant was lawfully possessed of a certain close, and that he took the cattle there damage feasant, the plaintiff may specially reply title in another, by whose command he entered, &c. and it does not vitiate the replication that it unnecessarily proceeded farther to give colour to the defendant. *Taylor v. Eastwood*, Hil. 41 Geo. 3. 212
4. One in possession of glebe land under a lease void by the stat. 13 Eliz. c. 20. by reason of the rector's non-residence, may yet maintain trespass upon his possession against a wrong doer. *Graham v. Pear*, Hil. 41 Geo. 3. 244

TROVER.

See BANKRUPT, No. 6 and 7, or PARTNER, No. 3 and 4.

USURY.

1. A bill of exchange payable to A. or order, which was legal in its inception, was by him indorsed to B. for an usurious consideration, who passed it to a third person for a valuable consideration, without notice of the usury, by whom it was paid to B.'s assignees after his bankruptcy, in satisfaction of a debt owing to the bankrupt's estate: held that the indorsement of A. to B. on an usurious account did not avoid the bill in the hands of an innocent holder by virtue

due of the statute of usury; and that *B.*'s assignees, being clothed with the rights of such innocent indorsee, were entitled to hold the bill against *A.*, though as between *A.* and *B.* the security was void. *Parr v. Eliason*, Mich. 41 Geo. 3. 92

2. An agreement on discounting a bill that the party should take in part payment another bill which had time to run as cash, although the full discount is taken, is usurious. *ib.*

3. Upon a contract to forbear 600*l.* for a year, reserving interest at the rate of 5*l.* per cent. for which a premium was paid in the first instance, the usury is complete upon the lender's receiving any part of the growing interest within the year. *Wade q. t. v. Wilson*, Hil. 41 Geo. 3. 195

4. The contract may be laid as for a forbearance to *A.* alone, who was the real debtor, although *B.* had joined with him in the security given to the lender. *ib.*

5. If *A.* be indebted to *B.* and *B.* to *C.* and *C.* agree for an usurious consideration to accept *A.* for his debtor instead of *B.*; this may be laid to be for an usurious loan of so much from *C.* to *A.* *ib.*

VENDOR AND VENDEE.

See STOPPING IN TRANSITU.

VENIRE.

See MANDAMUS, No. 2.

1. Though by the statute 9 Ann. c. 20. § 2. the prosecutor of a mandamus, to which there is a return, and issue taken on the facts therein, had an option to try the question in the same county in which he might have brought an action for a false return; yet if all the material facts are alleged in one county, and issue taken thereon there, he cannot issue the venire facias into another county, though he might originally have al-

leged the fact there, and have there brought his action for a false return. *Rex v. The Mayor, &c. of Newcastle*, Mich. 41 Geo. 3. 114

VERDICT.

See AWARD, No. 2.

VICTUAL.

See FORESTALLING, No. 20.

VERDICT.

1. A verdict against one defendant in trespass upon an issue of a justification of a public right of way, negating such right, is evidence in trespass for breaking and entering the same close against another defendant who justified under the same right; and the latter cannot shew that such verdict was entered upon that particular plea by mistake of the officer, there having been no evidence given on either side in respect of that issue on the former trial; the record being conclusive as to the fact of such a finding, though not as to the truth of it between other parties. *Reed v. Jackson*, East. 41 Geo. 3. 355

WARRANT OF ATTORNEY.

1. The rule of Court of the 4th Geo. 2. requiring an attorney to be present on behalf of a prisoner at the time of his executing a warrant of attorney to confess judgment, does not apply to a case where the party was in custody at the time at the suit of a third person. *Smith v. Buxton*, Hil. 41 Geo. 3. 241

WAY.

1. An order made by Justices of Peace, under the stat. 13th Geo. 3. § 78. § 19. for stopping up an old foot way, and setting out a new one, must follow the form prescribed in the schedule annexed to the act, and set forth the length and breadth of the new

new footway, otherwise it is no answer to a justification of a right of way pleaded to an action of trespass, *quare clausum fregit*, brought by the owner of the soil over which the old way led. The statute requires that the form set forth in the schedule "shall be used on all occasions, with such additions and variations only as may be necessary to adapt it to the particular exigency of the case." Under these words a material variance from the form prescribed is fatal, and may be taken advantage of in a collateral proceeding. *Davison v. Gill*, *Mich.* 41 *Geo.* 3. 64

2. A claim of a prescriptive right of way from *A.* over the defendant's close unto *D.* is not supported by proof that a close called *C.*, over which the way once led, and which adjoins to *D.* was formerly possessed by the owner of close *A.* and was by him conveyed in fee to another, without reserving the right of way; for thereby it appears that the prescriptive right of way does not, as claimed, extend unto *D.*, but stops short at *C.*—*Quere*, if the claim had been for a prescriptive right of way

over the defendant's close towards *D.* *Wright v. Rattray*, *East.* 41 *Geo.* 3. 377

3. But where in trespass *qu. cl. fr.* the defendant prescribed for an occupation way from his own close "unto through and over" the locus in quo to and unto a certain highway, &c. such plea may be sustained, though it appeared that one out of several intervening closes was in the possession of the defendant himself. *Jackson v. Shillito*, *Trin.* 32 *Geo.* 3. *C. B.* (cited) 381

WILL.

See DEVISE.

WITNESS.

1. If several be charged with the same offence, and no evidence be given on the part of the prosecution against one of them, he is entitled to an acquittal before the others are called upon for their defence, in order to enable them to avail themselves of his testimony as a witness. The case of the mutineers of his Majesty's ship *Bounty*. (cited) 313

END OF THE FIRST VOLUME.

